135-576

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 256.

THE DES MOINES AND FORT DODGE RAILROAD COMPANY, APPELLANT,

vs.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

FILED OCTOBER 27, 1886.

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1 Pleas in the Circuit Court of the United States for the Southern District of Iowa, Central Division.

At a term thereof begun and holden at the U. S. court-house in the city of Des Moines, in said district, on the second Tuesday in May, it being the 11th day of May, 1886, before the Honorable David J. Brewer, J. M. Love, and O. P. Shiras, judges of said court.
Attest: —— ——.

2 Be it remembered that heretofore, to wit, on the 16th day of May, 1885, The Des Moines — Ft. Dodge R. R. Co., by Nourse & Kauffman, its solicitors, filed a petition of intervention in a certain cause pending in said court wherein The Wabash, St. Louis & Pacific R'y Co. were complainants and The Central Trust Company of New York *et al.* were defendants; which said intervening petition, together with a notice of motion for leave to file same and the motion for leave to file, are in the words and figures following, to wit:

3 In the Circuit Court of the United States, Southern District of Iowa, Central Division.

WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY
vs.
CENTRAL TRUST COMPANY OF NEW YORK and JAMES CHEENEY *et al.*

To the said Wabash, St. Louis and Pacific Railway Company and the Central Trust Company of New York and James Cheeney, trustees, and the Des Moines Northwestern Railway Company and Solon Humphreys and Thomas E. Tutt, receivers:

You and each of you are hereby notified that the Des Moines & Ft. Dodge Railroad Company will, on the first day of the next term of the said United States circuit court for the southern district of Iowa, central division, to be begun and held at Des Moines, Iowa, on the 12th day of May, A. D. 1885, or as soon thereafter as the said court can hear the same, present to said court a motion for leave on the part of the said Des Moines and Ft. Dodge R. R. Co. to file a petition of intervention in the above-entitled cause, claiming the sum of fifty thousand dollars damages from the said Wabash, St. Louis and Pacific Railway Company and the said Des Moines Northwestern Railway Company by reason of the breach of a certain contract of date the 18th day of November, A. D. 1879, and the same is a first and paramount lien on the Narrow Gauge railroad between Waukee, in Dallas county, Iowa, and Panora, in Guthrie county, Iowa, and that said petition be referred to a master to take an account of said damages, and that said intervener have a decree accordingly.

NOURSE & KAUFFMAN,
Sol. for the Des Moines & Ft. Dodge R. R. Co.

4 We do hereby acknowledge service of the above notice, at ——, this — day of ——, 1885.

—— ——.

In the Circuit Court of the United States, Southern District of Iowa, Central Division.

WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY
vs.
CENTRAL TRUST COMPANY OF NEW YORK and JAMES CHEENEY, Trustees, *et al.*

To the said Wabash, St. Louis & Pacific Railway Company and the Central Trust Company of New York and James Cheeney, trustees, and the Des Moines Northwestern Railway Company and Solon Humphreys and Thomas E. Tutt, receivers:

You and each of you are hereby notified that the Des Moines & Ft. Dodge Railroad Company will, on the first day of the next term of the said United States circuit court for the southern district of Iowa, central division, to be begun and held at Des Moines, Iowa, on the 12th day of May, A. D. 1885, or as soon thereafter as the said court can hear the same, present to the court aforesaid a motion for leave on the part of the said Des Moines & Ft. Dodge R. R. Company to file a petition of intervention in the above-entitled cause, claiming the sum of fifty thousand dollars damages from the said Wabash, St. Louis and Pacific Railway Company and the said Des Moines Northwestern R. R. Co. by reason of the breach of a certain contract of date the 18th day of November, 1879, and that the same is a first and paramount lien on the Narrow Gauge railroad between Waukee, in Dallas county, Iowa, and Panora, in Guthrie
5 county, Ia., and that said petition be referred to a master to take an account of said damages, and that said intervener have a decree accordingly.

NOURSE & KAUFFMAN,
Sol. for the Des Moines and Ft. Dodge R. R. Co.

We acknowledge service of the above notice, at Des Moines, Ia., this 1st day of May, 1885.

(Signed) RUNNELLS & WALKER,
Att'ys for Rec'rs, Wabash, St. L. & P. R. Co.

STATE OF IOWA, } ss:
Polk County, }

I, B. F. Kauffman, do on oath say that on this 8th day of May, A. D. 1885, I served the within notice on the Des Moines Northwestern R. R. Co. by showing the original to J. S. Polk, its president, he waiving the reading thereof, and delivered to him a true copy thereof. All done at Des Moines, Iowa.

(Signed) B. F. KAUFFMAN.

Subscribed in my presence and sworn to before me by the said B. F. Kauffman this 8th day of May, A. D. 1885.

(Signed) W. H. MARTIN,
Notary Public in and for Polk County, Iowa.

Indorsement: Wabash, St. Louis & Pacific Railway Co. *vs.* Central Trust Company of New York *et al.* Notice of Des Moines & Ft. Dodge R. R. Co. Intervention. Nourse & Kauffman, for D. & Ft. D. R. R. Co.

6 In the Circuit Court of the U. S., Southern District of Iowa, Central Division.

WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY
vs.
CENTRAL TRUST COMPANY OF NEW YORK and JAMES CHEENEY, Trustees, *et al.*

To the said Wabash, St. Louis & Pacific Railway Company and the Central Trust Company of New York and James Cheeny, trustees, and the Des Moines Northwestern Railway Company and Solon Humphreys and Thomas E. Tutt, receivers:

You and each of you are hereby notified that the Des Moines and Ft. Dodge Railroad Company will, on the first day of the next term of the said United States circuit court for the southern district of Iowa, central division, to be begun and held at Des Moines, Iowa, on the 12th day of May, 1885, or as soon thereafter as the said court can hear the same, present to said court a motion for leave on the part of said Des Moines & Ft. Dodge R. R. Company to file a petition of intervention in the above-entitled cause, claiming the sum of fifty thousand dollars damages from the said Wabash, St. Louis and Pacific Railway Company and the said Des Moines Northwestern Railway Company by reason of the breach of a certain contract of date the 18th day of November, A. D. 1879, and that the same is a first and paramount lien on the Narrow Gauge railroad between Waukee, in Dallas county, Iowa, and Panora, in Guthrie county, Iowa, and that said petition be referred to a master to take an account of said damages, and that said intervener have a decree accordingly.

NOURSE & KAUFFMAN,
Sol. for the Des Moines and Ft. Dodge R. R. Company.

7 We do hereby acknowledge service of the above notice, at Des Moines, Iowa, this 1st day of May, A. D. 1885.

(Signed) H. S. GREENE,
Sol. for Compl't,
By DILLON & SWAYNE,
195 *Br'dw'y.*

In the Circuit Court of the United States in and for the Southern District of Iowa, Central Division.

WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY
vs.
CENTRAL TRUST COMPANY OF NEW YORK, JAMES CHEENEY, *et al.*
} Petition of Intervention.

Petition of Intervention by The Des Moines & Ft. Dodge Railroad Company vs. The Wabash, St. Louis & Pacific Railway Co. and the Des Moines Northwestern Railway Company et al.

The petitioners, The Des Moines & Ft. Dodge Railway Company, a body corporate created and existing under the general incorporation laws of the State of Iowa, ask leave of the court to file a petition of intervention in the above-entitled cause and ask for a reference of the same to take an account of the amount due petitioner from the defendants, The Des Moines Northwestern Railway Company and The Wabash, St. Louis and Pacific Railway Company, and the receivers herein, and that petitioners' claim be established and be declared a lien, paramount to that of all the other parties to this suit, upon so much of the Narrow Gauge railroad leased by the defendant, The Des Moines Northwestern Railway Company, to
8 the Wabash, St. Louis & Pacific Railway Company as is situated at and between the town of Waukee, in Dallas county, Iowa, and the town of Panora, in Guthrie county, Iowa, and the equipment and income of said road, and for a decree establishing and protecting the rights of petitioner.

Your petitioner here exhibits a petition setting forth the claim and right of paramount lien as aforesaid and shows to the court that the property upon which petitioner has a lien as aforesaid is now in the hands of a receiver of this court, and that petitioner has no other security for his debt.

That the said Des Moines Northwestern Railway Company and the Wabash, St. Louis and Pacific Railway Company are insolvent, and that the property now under the control of this court, by its receiver, is the only property owned by said corporations.

Petitioner asks leave to make the receiver a party to this suit, to the end that petitioners' paramount rights may be adjudicated and be ordered paid out of the income or by the sale of said property.

THE DES MOINES — FT. DODGE RAILWAY COMPANY,
By NOURSE & KAUFFMAN, *Their Attorneys.*

STATE OF IOWA, *Polk County,* } ss:

I, Charles C. Nourse, being duly sworn according to law, do depose and say that I am the attorney of the Des Moines — Ft. Dodge Railway Company; that I am as fully acquainted with the facts pertaining to this claim as any other officer or employee of the said

railroad company, and that the matters set out in the above petition are true as I verily believe.

(Signed) CHAS. C. NOURSE.

Subscribed in my presence and sworn to before me by the said Charles C. Nourse this 1st day of May, A. D. 1885.

[SEAL.]

(Signed) W. H. MARTIN,
Notary Public in and for Polk County, Iowa.

In the Circuit Court of the United States in and for the Southern District of Iowa, Central Division.

THE DES MOINES & FT. DODGE RAILROAD COMPANY
vs.
THE DES MOINES NORTHWESTERN RAILWAY COMPANY, THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, The Central Trust Company of New York, and James Cheeney, of Indiana, Trustees, etc.; Solon Humphreys & Thomas E. Tutt, Receivers, *et al.*

To the circuit court of the United States in and for the southern district of Iowa, central division:

Your petitioner intervening in this cause by leave of the court shows the court that the Des Moines & Ft. Dodge Railroad Company is a body corporate and existing under the general incorporation laws of the State of Iowa and is a citizen of said State, and that the defendant, The Des Moines Northwestern Railway Company, is also a body corporate, created and existing under the general incorporation laws of the State of Iowa, and that the defendant, The Wabash, St. Louis and Pacific Railway Company, is a body corporate, created and existing under the laws of the State of Missouri; that the other defendants, parties hereto, are residents and citizens of other States, as set forth in the several bills and answers of the parties to the original suit, to which this is an intervention, and that defendants, Solon Humphreys & Thomas E. Tutt, have been appointed receivers of this court and have charge of the property in controversy herein.

Petitioner shows to the court that heretofore, to wit, prior to the 18th day of November, 1879, the defendant, The Des Moines Northwestern Railway Company, had been organized and was doing business as a body corporate under the general incorporation laws of the State of Iowa by the name and style of the Des Moines, Adel and Western Railroad Company, and that on the 27th day of September, 1880, said company, by amendment to its articles of incorporation, changed its name and became thereafter the Des Moines Northwestern Railway Company, and by that name and style has ever since said date continued to transact business.

Petitioner shows that on said 18th day of November, 1879, the said defendant, The Des Moines Northwestern Railway Company,

by its then name and style of the Des Moines, Adel & Western Railroad Company, was the owner of a narrow-gauge railroad and its equipments, then or soon to be in operation, from the town of Waukee (a point on petitioner's road, in Dallas county) to a point at or near Adel, in Dallas county, and was engaged in constructing a further extension of its said railroad to Panora, in Guthrie county, and northwest from said Panora toward Spirit Lake, and did after complete or cause to be completed its said road to Panora and to a point northwest to Fonda, in Pocahontas Co., Iowa.

11 That petitioner then owned and has ever since owned and operated a standard-gauge railroad from Des Moines via Waukee to Ft. Dodge, in the State of Iowa.

The petitioner being desirous of obtaining all the Des Moines business of said narrow-gauge railroad for a term of years, and said Des Moines Northwestern Railway Company desiring to ship over petitioner's road a large amount of construction material for its own use, and also desiring to make a mutual agreement for freight and passenger transportation, did, on the said 18th day of November, 1879, enter into an agreement in writing with petitioner, a copy of which is hereto attached, marked Exhibit "A," and made a part hereof.

That by the terms of said agreement the said Des Moines Northwestern Railway Company, by its then name and style, agreed to deliver to the cars of the petitioner, at Waukee, in Dallas county, Iowa, all its freight and passengers bound to Des Moines or any place through Des Moines and beyond for the period of twenty years from and — said date; and in consideration thereof petitioner agreed to haul the construction material of the said Des Moines Northwestern Railway Company for the completion and extension of said railroad at half its local rates from Des Moines to Waukee, and to accept of the same half rate for all material theretofore hauled by petitioner for said defendant since the first of July, 1879.

And in consideration of said covenant aforesaid on the part of said defendant, The Des Moines Northwestern Railway Company, your petitioner agreed, out of the earnings on all through business from the road of said defendant delivered to petitioner's

12 road and by it delivered to the Rock Island road, and on all west-bound business delivered to said defendant's road and by it delivered to the Rock Island road, and on all west-bound business delivered to said defendant's road at Waukee, that said defendants should receive ($\frac{5}{7}$ths) five-sevenths and petitioners should receive two-sevenths ($\frac{2}{7}$ths), the local freight for defendant's road on west-bound business being included, but such division not to apply to business from beyond Panora, in Guthrie county.

That it was further agreed that on the freight on all local business from Des Moines to any point on said defendant's road or from any point on said defendant's road to Des Moines said defendant should receive two-thirds ($\frac{2}{3}$rds) and petitioner should receive one-third ($\frac{1}{3}$rd), including the local freight on both roads, but not including freight from beyond Panora.

And it was further agreed that all car-loads of freight coming

from or going to any point on the said defendant's road beyond Panora should be hauled by the petitioner's road from Waukee to Des Moines or from Des Moines to Waukee for five dollars ($5.00) the car-load of 2,000 lbs., standard-gauge cars, and that said defendant's road should receive all the freight and drawbacks earned thereon, and that in case through freight should thereafter be reduced a proportionate reduction should be made on the rate of hauling.

And it was further agreed that on all passenger business taken at the regular tariff rates from said defendant's road to or from Des Moines the petitioner's — should pay to said defendant's road one-tenth ($\frac{1}{10}$th) of its receipts therefrom.

13 And it was further agreed that said contract and any damages for the breach of the same should be a continuing lien upon the road of the said defendant, the then Des Moines, Adel & Western Railroad Company, now and since the Des Moines Northwestern Railway Company, its income, and equipment between Waukee and Panora aforesaid.

Petitioner charges and shows that said agreement was duly executed and acknowledged on the said 18th day of November, A. D. 1879, and was filed for record with the recorder of deeds of Dallas county on the 30th day of December, 1880, and that the defendant, The Wabash, St. Louis and Pacific Railway Company, also had actual notice thereof and prior to the 8th day of December, A. D. 1880.

Petitioner further avers and shows that it entered upon its part and performed all and singular the covenants of said agreement and hauled construction material for said Des Moines Northwestern Railway Company as follows:

In the year 1879	4,656,000 lbs.
In the year 1880	1,088,920 lbs.
In the year 1881	8,426,130 lbs.

That according to the established and usual rates for hauling such freight and the reasonable value of said services petitioner was entitled to charge and said Des Moines Northwestern Railway Company to pay the sum of eight thousand one hundred thirty and seventy-eight one-hundredths ($8,130.78) dollars, but by reason of the agreement aforesaid and in consideration of the covenants and undertakings of the said Des Moines Northwestern Railway

14 Company aforesaid petitioner allowed a rebate of one-half of said sum and received only the sum of four thousand sixty-five and thirty-nine — ($4,065.39) dollars on account thereof.

Petitioner shows that, with intent to violate its said agreement with petitioner, the said Des Moines Northwestern Railway Company, combining with the defendant, The Wabash, St. Louis and Pacific Railway Company, on the 8th day of December, 1880, entered into an agreement, a copy of which is hereto attached, marked Exhibit " No. 2 " (two), and made a part of this petition, and under said agreement the said defendant secured to be built and operated a narrow-gauge railroad from Waukee, in Dallas county, Iowa, to

the city of Des Moines, in Polk county, Ia., and the said Des Moines Northwestern Railway Company afterwards, to wit, upon the 28th day of February, A. D. 1881, executed a lease of its entire road to the defendant, The Wabash, St. Louis & Pacific Railroad Company, and on the same day also executed a deed of trust on its entire road to the defendant, The Central Trust Company of New York, and James Cheeney, as trustee, to secure bonds to the amount of seven thousand ($7,000.00) dollars per mile on said narrow-gauge railroad. A copy of said lease and trust is set out on pages 690 & 700, as Ex. 58 & 59 of the book of exhibits, in the original suit, to which this is an intervention, and petitioner here refers to them and asks leave by reference to make them a part of this petition.

Petitioner shows that by the terms of said contract between the Des Moines Northwestern Railway Company and by the terms of said lease the defendant, The Wabash, St. Louis & Pacific Railway Company, took said leased property, subject to the con-
15 tract of the petitioner with the said Des Moines Northwestern Railway Company, and that the said Wabash, St. Louis & Pacific Railway Co. expressly agreed and stipulated to indemnify and save harmless the said Des Moines Northwestern Railway Company from all costs, damages, liabilities, or penalties growing out of or in connection with the operation or non-operation of said railroad property.

Petitioner avers that, in pursuance of said lease, the defendant, The Wabash, St. Louis & Pacific Railway Company, took possession of said narrow-gauge railroad so leased as aforesaid, and has ever since and up to the time of the appointment of the receivers in the original cause continued to operate said road.

That in utter disregard of the said contract of November 18th, A. D. 1879, the said defendants, The Des Moines Northwestern Railway Company and the Wabash, St. Louis & Pacific Railroad Company, and the defendants, Solon Humphreys and Thomas E. Tutt, receivers, have failed and refused to deliver to the cars of the Des Moines & Ft. Dodge Railroad Company all or any of its freight or passengers bound to Des Moines and to places through and beyond Des Moines; but, on the contrary, the said defendants caused to be constructed a narrow-gauge railroad from Waukee to Des Moines, and from and after the 28th day of October, 1881, carried all the freight coming over their said road to Waukee from points westward and northwest over the said extension to Des Moines, and carried all the passengers coming over the said road from points
16 west and northwest on the said narrow-gauge railroad from April, 1882, over said extension to Des Moines, and operated the said road to Des Moines as a continuous line in utter disregard of the right of petitioner under the contract of November 18th, 1879.

Petitioner shows and avers that after the contract of November 18th, 1879, and up to the said 28th of Oct., 1881, the said Des Moines Northwestern Railway Company and the said Wabash, St. Louis and Pacific Railway Co., in pursuance of said contract of Nov. 18th, 1879, sold tickets for passengers at the various stations upon their said

Narrow Gauge railroad to Des Moines and to points beyond, and paid over to petitioner, under said contract, as petitioner's *pro rata* share of said business, as follows:

From the 1st day of January, 1880, to the 31st day of December, 1881, the sum of $3,140.76; and in pursuance of said contract the said defendant companies billed freight to Des Moines at the various stations over said Narrow Gauge railroad, and paid over to said petitioners, under said contract, as petitioner's *pro rata* share of freight earnings, as follows:

From July 1st, 1879, to Dec. 31st, 1879	$1,055 18
From Jan'y 1st, 1880, to Dec. 31st, 1880	2,477 37
From Jan. 1st, 1881, to Dec. 31st, 1881	1,848 78
Making a total of	$5,381 33

That for transporting through freights—that is, for freight for points beyond Des Moines, but delivered by defendants to petitioners at Waukee and carried to Des Moines and delivered to other roads—petitioner carried freight and earned under said contract of Nov. 18th, 1879, from July 1st, 1880, to Dec. 31st, 1881, the sum of $15,706.04.

That as the road of said defendants was extended popula-
17 tion increased along the line thereof, and the said business has greatly increased and will continue to increase, and the loss and damage to petitioner by reason of the breach of said contract is the sum of fifty thousand dollars.

Your petitioner therefore prays that defendants severally be required to answer this petition, but not under oath, and that a reference may be made to a master to take the evidence and report to the court the amount due to petitioner by reason of the damages aforesaid, and that said sum be declared a first lien on said Narrow Gauge railroad from Waukee, in Dallas county, to Panora, in Guthrie county, Iowa, and the equipment and income thereof, and that said sum be first paid before any of the claims of the defendants to this petition of intervention, and that the receivers be required to pay the sum of — out of the rents and income or earnings coming into their hands before any other claims, and that the said railroad be sold for the payment of petitioner's claim, and for such other and further and full relief as the petitioner is entitled to receive.

(Signed) NOURSE & KAUFFMAN,
Solicitors for Petitioner, The Des Moines & Ft. Dodge R. R. Co.

STATE OF IOWA, } *ss:*
Polk County, }

I, Charles C. Nourse, being duly sworn according to law, do depose and say that I am the attorney of the Des Moines & Fort Dodge Railway Company; that I am as fully acquainted with the
18 facts pertaining to this claim as any other officer or employee of said road, and that the matters set out in the above petition are true, as I verily believe.

(Signed) CHAS. C. NOURSE.

Subscribed in my presence and sworn to before me by the said Chas. C. Nourse this 2d day of May, A. D. 1885.

(Signed) W. H. MARTIN,

[SEAL.] *Notary Public in and for Polk County, Ia.*

Recorded, Dallas county, Dec. 3d, 1880, Miscellaneous Records Book "D," p. 97.

EXHIBIT No. 2.

This agreement, made the 18th day of November, 1879, between the Des Moines & Ft. Dodge Railroad Company, of the one part, called for convenience the Des Moines Company, and the Des Moines, Adel & Western Railroad Company, called for convenience the Adel Company, witnesseth:

That the Des Moines Company, being desirous of obtaining all the Des Moines business of the Adel Company for a long term of years, in consideration of the contract on the part of the Adel Company hereinafter contained, doth hereby agree and covenant with the Adel Company and grant and give unto it the following easements, rights, and privileges as follows:

First. Out of the earnings on all through business from the Adel road delivered to the Des Moines road and by it delivered to the Rock Island road and on all west-bound business delivered to the Adel road at Waukee the Adel road shall have five-sevenths ($\frac{5}{7}$) and the Des Moines road shall have and retain two-sevenths ($\frac{2}{7}$), the local freight for the Adel road on west-bound business being in-
19 cluded, but these divisions not to apply — business from beyond Panora.

Second. On the freight on all local business from Des Moines to any point on the Adel road or from any point on the Adel road to Des Moines the Adel road shall receive two-thirds ($\frac{2}{3}$), while the Des Moines road shall receive one-third ($\frac{1}{3}$), including the local freight on both roads, but freight from beyond Panora not to be included.

Third. All car-loads of freight coming from or going to any point on the Adel road beyond Panora shall be hauled by the Des Moines road from Waukee to Des Moines or from Des Moines to Waukee at five dollars ($5.00) the car-load, 2,000 lbs., standard-gauge cars, and the Adel road shall be entitled to receive all the freights and drawbacks earned thereon. In case through freight shall hereafter be reduced from what they are now a proportionate reduction shall be made on the rate of hauling.

Fourth. On all passenger business taken at the regular tariff rates from the Adel road to or from Des Moines the Des Moines road will pay over to the Adel road one-tenth ($\frac{1}{10}$) of its receipts therefrom.

Fifth. The Des Moines road will allow the Adel road the joint use of all its station-houses and station facilities at Waukee on its paying its proportion for its maintenance, to be arranged by the superintendents of the two roads.

Sixth. The Adel road to have equal privileges at Des Moines and equal rates on all construction material with those enjoyed by the

Des Moines road, and every facility or rate or increased rate obtained from the Rock Island road shall be enjoyed and shared by the
20 Adel road, and the Des Moines road will haul its construction material at half its local rates from Des Moines to Waukee, this to apply to all material hauled since the first of July last.

Seventh. Uniform rates shall be maintained by both roads at all competitive points and both roads shall join in requiring the Rock Island to do the same, as far as able, and if the Rock Island shall persistently and continuously refuse to maintain such uniform rates in accordance with Mr. Riddle's letter of this date, which is made a part of this contract, at such competitive points, then the Adel road may, by giving thirty (30) days' notice in writing of its intention so to do, terminate this contract.

Eighth. If the Des Moines road accounts to the Adel road for forty per cent. of the through earnings on through freight, although its share of the through earnings should hereafter be reduced to a less amount, this agreement to continue, and in the event of its failure to do so the Adel road to have the right to terminate this contract upon thirty days' notice in writing.

Ninth. It is agreed that if the Des Moines road shall at any time lease or transfer its through business at Des Moines to any other than the Rock Island railroad the Adel road shall have the privilege then to terminate this contract by giving thirty days' notice in writing of its intention so to do.

Tenth. The Des Moines agrees that in case any railroad shall be built or operated by it or by the Rock Island on the territory west of the Des Moines road, south of the Northwestern road, and east of the projected line of the Rock Island from Guthrie Centre to Guthrie, then the Adel road may terminate this contract on giving thirty days' notice in writing.

21 Eleventh. Settlements and adjustments under this contract shall be made monthly on the first day of every month, unless otherwise agreed on.

Twelfth. In consideration of the foregoing the Adel road hereby agrees to deliver to the cars of the Des Moines road at Waukee all its freight and passengers bound to Des Moines or to any place through Des Moines and beyond for the period of twenty years from this date.

This contract and any damages for the breach of same shall be a continuing lien upon the roads of the two contracting companies, their equipment and income, in whosesoever hands they may come, the lien on the Adel road being limited to so much *of* thereof as lies between Waukee and Panora.

(Signed) THE DES MOINES AND FORT DODGE RAILROAD COMPANY,
By CHARLES E. WHITEHEAD, *Pres't.*
THE DES MOINES, ADEL & WESTERN RAILROAD COMPANY,
By T. J. COLDWELL, *Pres't.*
J. S. RUNNELLS, *Sec'y.*

CHICAGO, ROCK ISLAND & PACIFIC R. R.,
PRESIDENT'S OFFICE, CHICAGO, ILL., *Nov. 18th*, 1879.

Chas. E. Whitehead, Esq., pres't D. M. & Ft. D. R. R. Co.

DEAR SIR: The Chicago, Rock Island & Pacific Railroad Company will receive, at the city of Des Moines, from the Des Moines & Ft. Dodge Railroad Company freight originating at Waukee
22 or on the line of the Des Moines, Adel & Western railroad and deliver freight destined to the above-named points at the same place, accepting as full compensation for transportation over their road sixty per cent. of the established through tariff rates, such joint rates to be agreed upon by our respective freight agents in consultation with the freight agent of the Des Moines, Adel and Western railroad.

It is further agreed that through rates to and from stations on the Chicago, Rock Island and Pacific railroad that are competitive with Waukee or other points on the Des Moines, Adel and Western railroad shall be established at a reasonable advance above rates to the city of Des Moines, and rates thus established shall be strictly adhered to and maintained by the agents of all the companies interested.

It is understood that the present tariff rates will be continued, subject to such modifications as may be agreed upon by our respective — or may become necessary to meet the competition of other lines.

Yours truly, HUGH RIDDLE, *President.*

STATE OF IOWA, }
Polk County, } *ss:*

On the twenty-first day of August, 1880, before me, C. B. Kauffman, a notary public in and for said county, personally came J. S. Runnells, personally to me known to be the party who affixed to the foregoing contract the signature of the Des Moines, Adel & Western railroad, by T. G. Caldwell as president and J. S.
23 Runnells as secretary, and acknowledged the signature of said company to have been thereto affixed by him as his voluntary act and deed on behalf of and by authority of said company and its board of directors, and that the seal thereto affixed is the genuine seal of the said Des Moines, Adel & Western Railroad Company, affixed thereto by him by authority of the said board of directors of the said company, and that his said acts in the premises in the execution thereof and the affixing of said seal were by him voluntarily done and executed by and in behalf of said company for the purposes therein expressed.

And on the same day personally before me came Charles E. Whitehead, personally to me known to be the president of the Des Moines & Ft. Dodge Railroad Company and to be the identical person who affixed his signature to said contract and the signature of the Des Moines & Ft. Dodge Railroad Company thereto, by himself as president, and acknowledged the affixing of said signature of the said Des Moines & Ft. Dodge Railroad Company thereto, by himself

as president, and acknowledged the affixing of said signature of the said Des Moines & Ft. Dodge Railroad Company to be his voluntary act and deed as its president, voluntarily done and executed by authority of the board of directors of said company.

In witness whereof I have hereunto affixed my hand and notarial seal the day and date above written.

[SEAL.] (Signed) C. B. KAUFFMAN,
Notary Public.

24 EXHIBIT No. 1.

This memorandum of an agreement made and entered into by and between the Des Moines Northwestern Railway Company, hereinafter for convenience styled the Des Moines Company, of the one part, and the Narrow-Gauge Railway Construction Company, hereinafter called the Construction Company, of the second part, and the Wabash, St. Louis & Pacific Railway Company, hereinafter called the Wabash Company, of the third part, witnesseth:

Whereas the Des Moines Company has heretofore constructed its road from Waukee, a point on the Des Moines and Ft. Dodge railroad about fifteen miles west of Des Moines, to Panora, in Guthrie county, Iowa, and thereupon suspended further construction of said railroad for want of funds;

Whereas said company desires to raise funds to further extend its railroad, pay off the floating debt, and fund its bonded debt at a lower rate of interest and at a longer time;

Whereas so much of its said railroad as is now completed was built under a contract with the construction company whereby the Des Moines Company agreed to issue to the construction company seven thousand five hundred dollars per mile of its capital stock and five thousand dollars per mile of its bonds, bearing seven per cent. interest and payable in twenty years, secured by mortgage on its road, all of which should be received by said construction company in payment for the completion of said contract on its part;

Whereas said construction company has completed its contract with said Des Moines Company, and has received from said company the bonds and stock it was entitled to under said contract;

Whereas said construction company and its members individually still own and hold said stock and bonds, which stock is all the capital stock of said Des Moines Company, except about thirty
25 thousand dollars issued and to be issued for subsidies and conditional subscriptions, and the bonds so held by the members of the construction company constitute the entire bonded debt of the company;

Whereas said construction company and its members own or control the entire floating debt of the said Des Moines Company;

Whereas said construction company and its members desire to put the Des Moines Company in position to raise funds to further extend its road, pay off its floating debt, and fund its outstanding bonds at a lower rate of interest, and to that end are willing to surrender the stock and bonds held by it and them and to pay off the

floating debt to the Des Moines Company, receiving therefor new stock and bonds of the Des Moines Company, hereafter mentioned, on such terms as may be just and equitable;

And whereas the Des Moines Company did on the 18th day of November, 1879, enter into a contract with the Des Moines and Fort Dodge Railroad Company for the disposition of its business, to which reference is hereby made, and has certain contract relations with the Western Union Telegraph Company;

And whereas the Wabash Company is now negotiating for the purchase or lease of the Des Moines & Ft. Dodge road as aforesaid;

And whereas the Wabash Company has entered into an arrangement with the Des Moines & St. Louis Railroad Company whereby the Wabash Company is to have a lease in perpetuity of said Des Moines and St. Louis railroad, when completed, which will give the Wabash road a route to Des Moines;

And whereas the Wabash Company desires to obtain the
26 through business arising on the Des Moines road, and to have said road extended for the purpose of increasing the business to be derived therefrom:

Now, therefore, in consideration of the premises and to carry out the objects above mentioned, it is agreed and stipulated by and between the several parties hereto—

First. That the construction company shall surrender to the Des Moines Company all the stock and bonds of the Des Moines Company held by it or its several members, and the same shall be canceled and the mortgages given to secure said bonds released of record, and will further cause to be paid, released, or discharged the entire floating debt of said Des Moines Company, so that the mortgage hereinafter mentioned shall be the first mortgage on said company's property.

Second. The construction company shall further cause all the floating debt of the Des Moines Company to be surrendered or discharged, so that the said railroad shall be free from debt and from all liens, except by way of contract with the Western Union Telegraph Company and with the Des Moines & Ft. Dodge Railway Company, as hereinbefore referred to.

Third. The construction company will also, with all reasonable dispatch, locate, provide right of way and grounds for, construct, complete, and reasonably equip an extension of the Des Moines Company's railroad for thirty miles northwesterly from Panora and such further extensions northwesterly as far as Spirit Lake or to some point in that vicinity or to the north line of Iowa, with a branch, if required, to Sioux City, as the Des Moines Com-
27 pany may hereafter demand, upon the terms and conditions hereinafter set forth. Any demand for extension beyond thirty miles from Panora shall be made within three years from this date.

Fourth. In consideration of the foregoing the Des Moines Company will pay to the construction company for each mile of its railroad now complete and for each mile which the construction company shall hereafter complete seven thousand dollars in bonds of

the Wabash Company of the series issued under the general mortgage of that company, and the Des Moines Company shall further execute to the trustees of said general mortgage a special mortgage, which shall be a first lien, to the extent of seven thousand dollars per mile, on the railroad, property, equipment, and appurtenances of the Des Moines Company then held or thereafter to be acquired for the benefit of all holders of bonds issued under said general mortgage. Said mortgage shall, however, be so written that no foreclosure shall take place so long as the interest upon — amount equal to seven thousand dollars per mile in said bonds is paid to said trustees according to the tenor and effect of the said bonds.

Fifth. In further consideration of the foregoing the Des Moines Company will pay to the construction company ten thousand five hundred dollars in the capital stock of the said Des Moines Company for each mile of its railroad now complete and that may hereafter be completed, and will further pay and transfer to said construction company all subsidies, donations, and conditional benefits which said Des Moines Company may receive or secure in aid of the extension of its railroad as above set forth.

Sixth. To enable the Des Moines Company to make payment as above in its capital stock the construction company will
28 immediately subscribe to the capital stock of the Des Moines Company an amount equal to ten thousand five hundred dollars for each mile of the said thirty miles immediately to be built, and will make like subscriptions prior to entering on the work of any subsequent extension, every such subscription to be payable in the construction and equipment of said railroad, as above provided, and shall stipulate that the subscriber shall receive proportionate amounts of all the bonds, stocks, and subsidies above enumerated as fast as each successive section of five miles shall be completed.

Seventh. To enable the Des Moines Company to procure the bonds of the Wabash Company above stipulated to be paid, the construction company agrees that as fast as the stock of said Des Moines Company or any part thereof shall be received by it, whether issued on that part of said railroad already completed or upon any extension thereof, it will divide equally with the Wabash Company such portion of said stock as shall remain after delivering to the parties who shall be entitled to receive stock in consideration of taxes paid or other conditional aid so much as they are entitled to receive. The intention and agreement of the construction company and the Wabash Company is hereby declared to be that each of said companies shall have an equal voice and interest in the control and earnings of said Des Moines Company, and to that end it is agreed that so much of the stock of — company as shall be issued in consideration of taxes paid or other conditional benefits shall be bought in for account of said Des Moines Company, as fast as practicable, from the earnings of said road or from funds provided by the parties hereto. Said stock when paid for by the Des Moines Com-
29 pany shall be immediately cancelled. Pending the purchase of said stock by the Des Moines Company the construction

company shall transfer to the Wabash Company an equivalent amount to the Des Moines Company's stock, to be returned as fast as the stock is issued in consideration of taxes paid, — shall be bought in by the Des Moines Company, so that the Wabash Company shall have and control at all times, as exactly as possible, one-half of all outstanding stock of the Des Moines Company. If the Des Moines Company shall fail to take up any said stock, which shall be bought in by individual members of the construction company, the Wabash Company shall have the right to one-half of any stock so purchased upon paying one-half the cost.

It is further agreed by the construction company and the Wabash Company that the stock of both companies shall be voted for — a board of directors, consisting of nine members, four of whom shall be nominated by the Wabash Company, four by the construction company, and the remaining one shall be chosen by the eight persons thus selected.

The Des Moines Company on its part agrees—

First. It will immediately execute and deliver to the Wabash Company a lease in perpetuity of its railroad property and appurtenances from time to time as required.

It shall keep full and separate accounts, which shall be open to inspection by the parties hereto, of the earnings of the said railroad, and shall apply the same, after paying the expenses of maintenance and operation as above—

First. To the payment of all taxes and assessments on the
30 railroad and property of the said Des Moines Company.

Second. To the payment of interest on the bonds of said Wabash Company, to be issued as above at the rate of seven thousand dollars for each mile of its railroad now complete, and to be issued at the same rate hereafter as — each mile of any extension thereof, as the same shall be hereafter completed.

Third. To the payment of dividends upon the capital stock of the said Des Moines Company.

The Wabash Company shall, however, in said lease expressly guarantee that the net earnings of said railroad shall at all times be fully equal to the taxes and assessments of said railroad and property, the necessary renewals of said railroad and equipments, and to the payment of interest on said bonds. The amount so applicable to taxes, interest, and dividends shall in each year be not less than thirty per cent. of the gross earnings of said railroad.

The Wabash Company shall, moreover, in said lease expressly stipulate that upon all through freight originating on the line of the said railroad and upon all through freight coming to said railroad from the railroad of the Wabash Company and having final destination at some point on the railroad of the Des Moines Company there shall be allowed to said Des Moines Company and computed as a part of said earnings a division which shall amount to not less than twenty-five per cent. of the gross amount received for transportation of the freight from or to Chicago, Peoria, St. Louis, or other points on the Mississippi river according to the destination of such freight. Freight passing to or coming from beyond the points

above named shall be treated as if originating at or destined
31 to those points. It shall, however, be expressly stipulated that a higher rate shall be allowed to the Des Moines Company whenever such higher rate is allowed to other local roads at Des Moines or places similarly situated, and in the event of a disagreement on this point between the Wabash Company and the Des Moines Company or any stockholder thereof the matter shall be submitted to and determined by arbitrators, as elsewhere provided in the agreement.

The Des Moines Company on its part agrees—

First. It will at once execute and deliver tot he Wabash Company a lease of its railroad and property upon the terms above described.

Second. It will execute a mortgage, as *the* above provided for, covering its railroad, equipment, property, and income, to further secure such of the bonds of the Wabash Company of the series issued under the general mortgage of that company as shall be delivered to the Des Moines Company, to be used in accordance with its covenants above set forth.

Third. It will except from its construction company a subscription to its capital stock, payable in the construction of an extension of its road for thirty miles northwesterly from the present terminus of its completed road, and will hereafter accept and comply with such further subscriptions as the construction company may make, upon the same terms, for the further extension of its railroad within the limits above mentioned to Sioux City and Spirit Lake.

Fourth. It will at once make further provision for an increase
32 of its board of directors to nine persons, as above provided for, and will further cause its articles of incorporation to be amended, so that the board of directors of said company shall have express authority to carry out the provisions of this agreement.

The Wabash Company on its part agrees—

First. It will accept a lease of the railroad property to the Des Moines Company upon the terms above set forth and will faithfully perform the conditions of said lease on its part to be performed.

Second. It will furnish to the Des Moines Company so many of the bonds issued under the general mortgage of said Wabash Company as shall from time to time be required for delivering to said construction company upon compliance by said construction company with its covenants above set forth.

Third. It will repurchase from the construction company all or any part of the bonds last above mentioned at an agreed price of ninety-five per cent. of par value of said bonds upon that sum whenever the construction company shall not find a purchaser at a price above that sum.

The bonds so offered for purchase shall, however, be presented at the office of the Wabash Company, in the city of New York, and payment shall be made within three days from that date.

If the Wabash Company shall fail so to repurchase the two hundred and ten thousand dollars of said bonds to be issued on the thirty miles of said railroad now completed, then the construction

company may declare this agreement void, provided said bonds are presented for repurchase within sixty days from the date of this agreement.

33 It is further mutually agreed by and between the parties above named that if certain pending negotiations between the Wabash Company and the Des Moines and Ft. Dodge Company shall result in the Wabash Company's acquiring control, by lease or otherwise, of the Des Moines & Ft. Dodge road, then the Des Moines Company shall have the right, upon terms to be fixed by agreement of the parties, otherwise to be settled under the general provisions herein made for arbitration, to extend its line into Des Moines by laying a third rail upon the Des Moines and Fort Dodge road.

It is further mutually agreed by and between the parties above named that if the pending negotiations between the Wabash Company and the Des Moines & Fort Dodge Company shall fail, then the railroad of the Des Moines Company shall be extended to a connection with the railroad of the Des Moines and St. Louis Company at or near Des Moines, substantially under the provisions of the foregoing agreement, but with such modifications as the greater cost of such extension may require. The Des Moines Company shall in that case have full right of entry into Des Moines by laying a third rail on the Des Moines & St. Louis road, and full use of the terminal facilities of that road upon terms to be settled by agreement between the Des Moines Company and the Wabash Company or else under the arbitration elsewhere provided for herein.

It is further agreed upon the part of the Wabash Company that — it shall acquire control of the Des Moines & Fort Dodge road, then the Wabash Company will permit the Des Moines Company to lay down a third rail on the track of the Des Moines & St. Louis road from the terminus of the Fort Dodge road, in the city of Des Moines, eastwardly far enough to reach such pork-houses and other

34 sources of freight as are on the east side of the city of Des Moines and are reached by the tracks of the Des Moines & St. Louis road, payment to be made to the Des Moines & St. Louis road by the Des Moines Company upon reasonable terms to be fixed by agreement or by arbitration above provided for.

The parties above named do further agree as follows:

First. The entire location and construction of the said extension of the Des Moines railroad shall be under the supervision and control of the Wabash Company, which shall appoint an engineer to superintend the same. It is further agreed between the parties hereto that all matters of difference arising between them or any of them under this contract shall be submitted to arbitration of three persons, one of which shall be selected by the Wabash Company, one by the construction company or its members, and the two thus selected shall choose a third, and their decision in writing touching all such matters as may be submitted to them in writing shall be final and conclusive between the parties.

In witness whereof the parties named have caused their respective signatures and seals to be affixed by their presidents and attested by

the secretaries, respectively, this eighth day of December, A. D. 1880.

THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY,
By SOLON HUMPHREYS, *Pres't.*

Attest: [SEAL.] JAS. F. HOW, *Secretary.*

THE DES MOINES NORTHWESTERN RAILWAY CO.,
By J. S. POLK, *Pres't.*

Attest: [SEAL.] J. S. RUNNELLS,
Sec. D. M. N. W. R. R. Co.

35 THE NARROW-GAUGE RAILWAY CONSTRUCTION COMPANY,
By F. M. HUBBELL, *Pres't.*

Attest: [SEAL.] J. S. RUNNELS,
Sec. N. G. R. Cons. Co.

The undersigned, who are all the stockholders of the construction company mentioned in the above contract, hereby assent as such to said contract.

December 16, 1880.

J. S. POLK.
J. S. CLARKSON.
J. S. RUNNELLS.
F. M. HUBBELL.

36 SUB-EXHIBIT F No. 58.

Lease—Des Moines Northwestern Railway Company.

This indenture, made this twenty-eighth day of February, A. D 1881, by and between the Des Moines Northwestern Railway Company, of the first part, and the Wabash, Saint Louis and Pacific Railway Company, of the second part, witnesseth:

Whereas, by the terms of a contract made and entered into on the eighth day of December, A. D. 1880, by and between the Des Moines Northwestern Railway Company, of the first part, the Narrow-Gauge Railway Construction Company, of the second part, and the Wabash, Saint Louis and Pacific Railway Company, of the third part, reference thereto being hereby made, it is, among other things, mutually provided and agreed that the railroad of the said Des Moines Northwestern Railway Campany may, under and in pursuance of said agreement, be leased by the said Des Moines Northwestern Railway Company to the Wabash, Saint Louis and Pacific Railway Company upon the terms and conditions in said agreement specified; and, further, that, in pursuance of said agreement, the said railroad may be extended southerly to the city of Des Moines, Iowa, and northwesterly from the present terminus of its completed road to Spirit Lake, or to some point in that vicinity, or to the north line of the State of Iowa, with a branch to Sioux City, Iowa:

Article I. The first party, in pursuance of the resolutions of its board of directors, adopted on the — day of ——, A. D. 1881, and in consideration of the agreements and covenants of the said second party, hereinafter contained, does hereby let, demise, and lease unto
37 the said second party, its successors and assigns, for the term of ninety-nine years from the date of this lease, renewable in like periods forever, at the option of the said second party, the railroad of the first party, as now constructed or as the same may be hereafter constructed (the portions of said railroad now constructed extend from Waukee, in Dallas county, Iowa, northwesterly to Panora, in Guthrie county, Iowa, and the contemplated extensions of said railroad are from Waukee to Des Moines and from Panora to or in the vicinity of Spirit Lake, or to the north line of the State of Iowa and to Sioux City, in said State, or to both of said places), together with all its real estate (except such lots or lands as may not be necessary for the operation of said road), its right of way, embankments, bridges, turn-outs, side-tracks, buildings, structures, water-tanks and fixtures, shops, engine and other houses, depots, turn-tables, cars, machinery, tools, and all its railroad property, acquired and to be acquired, and everything appurtenant thereto or used in connection therewith, together with all rents, issues, profits, tolls, and earnings accruing to said party of the first part, and all the franchises, powers and privileges, and chartered or other rights of the said first party, so far as the same may be needful or advantageous to said second party as lessees of the premises above described: Provided, That if, as to any lots or lands, parcel of said real estate, and not within the actual right of way of said railroad (the same being in the main one hundred feet in width, except as where narrowed by a street), the president for the time being of the Wabash, St. Louis and Pacific Railway Company shall unite with the first party hereto in a conveyance of the same, then such conveyance shall be taken as conclusive evidence that said lots
38 or lands are not necessary for or used in the operation of said railroad:

To have and to hold the said demised railroad and property, real and personal, and franchises, as above provided, unto the said second party, its successors and assigns, to and for the full end and term of ninety-nine years from and after the date of these presents, and any and all renewals thereof forever, at the option of the second party, as above set forth.

Art. II. And in consideration of the premises the second party hereby covenants and agrees that it will maintain and operate the said railroad as the same is now or may be hereafter constructed in pursuance of the agreement hereinbefore referred to, keeping the same fully equipped and in good condition and repair for the full term of this lease and of any renewals thereof, and that it will carefully and prudently manage said railroad and property, and at all times during the continuance of this lease will carry and transport on said railroad, with reasonable dispatch, all freight and passenger traffic offered for transportation and destined to the termini of said railway or to any point that can be reached by passing over the

same, so far as the party of the second part can reasonably control the same, and it will in all reasonable ways build up and foster the business on the same, charging such reasonable rates therefor as may from time to time be charged upon other roads similarly situated in the State of Iowa, and that it will indemnify and save harmless the said party of the first part from all costs, damages, liabilities, or penalties whatsoever growing out of or in connection with the operation or non-operation of said railroad and property.

Art. III. The party of the second part shall and will collect and receive all the tolls, freight charges, dues, incomes, and profits arising from the operation of said demised premises or in any way growing out of its business or property, and will apply and appropriate the same in the way and manner following, to wit:

1. To the payment of the necessary expenses of maintenance and operation, as above provided for.

2. To the payment of all taxes, duties, imposts, and charges of every kind and nature imposed by any governmental or lawful authority whatever on said demised railroad and premises or any part thereof, or upon any business or earnings or income of the same, or upon the party of the first part with respect to the same, or by reason of the rental herein stipulated to be paid, or with respect to any interest or rights under these premises, or that may be assessed on the capital stock of the party of the first part, or income therefrom, and which by law is required to be paid by the party of the first part.

3. To the payment of interest on the bonds of the party of the second part to be issued under said contract of December eighth, 1880, aforesaid, at the time and place provided for in said bonds, secured by the mortgage of the party of the first part, of even date herewith.

4. The balance of the earnings of said road shall be accounted for by the party of the second part and paid over semi-annually to the party of the first part on the first days of January and July of each year, and by it applied, after paying the expenses of the party of the first part, to the payment of dividends to its stockholders.

Art. IV. The party of the second part, however, hereby expressly guarantees that the net earnings of said railroad company shall at all times be fully equal to the taxes and assessments, imposts and charges, on said railroad and property, as above provided for, the necessary renewals of said railroads and equipments, and to the payment of the interest on the bonds of the party of the second part, so to be furnished under said contract of Decem. eighth, 1880, and the amount so applicable to the payment of taxes, interest, and dividends shall in each year be not less than thirty per cent. of the gross earnings of the said railroad.

The party of the first part further agrees and stipulates that upon all through freight originating upon the line of said railroad and upon all through freight coming to said railroad from the railroad of the party of the second part and having final destination at some point on

the railroad of the party of the first part there shall be allowed to the party of the first part and computed as part of said earnings a division which shall amount to not less than twenty-five per cent. of the gross amount received for the transportation of like freight from or to Chicago, Peoria, St. Louis, or other points on the Mississippi river, according to the destination of said freight. Freight passing to or coming from beyond the points above named shall be treated as if originating at or destined to those points.

It shall, however, be expressly stipulated that a higher rate shall be allowed to the party of the first part whenever such higher
41 rate is allowed to other local roads at Des Moines or places similarly situated, and in the event of a disagreement on this point between the party of the first part and the party of the second part, or any stockholder thereof, the matter shall be submitted to and determined by arbitrators, as elsewhere provided in this agreement.

Art. V. It is further agreed that the party of the second part shall keep accounts of all the receipts and revenues arising from the business and traffic over and upon the said demised railway and property, and of the costs and expenses of repairing, maintaining, perpetuating, working, using, operating, and running the said railway and property, and the books of said party of the second part relating thereto shall at all times be subject to examination by the party of the first part through any agent duly authorized so to do; and the president of the party of the first part or any duly authorized agent of said company shall be supplied with the necessary authority giving them the right at all times to travel without charge on the cars of the party of the second part over the said demised railway, for the purpose of examining and inquiring into the business and management of the said railway and of reporting thereon to the party of the first part; and the party of the second part will make for the party of the first part all reports or statements of its earnings and business, as required of it by law, or furnish the necessary data therefor.

Art. VI. It is hereby further covenanted, promised, and agreed by and between the parties hereto that in case the said party of the second part shall at any time during the term aforesaid fail,
42 neglect, or refuse to apply the earnings and receipts of said railway and premises to the payment of any expenses incurred in the operation of said railway and of any taxes, assessments, or charges levied upon the same under or by virtue of the laws of the State of Iowa or other competent governmental authority, or in case the said party of the second part shall at any time during the term of this lease as aforesaid fail, neglect, or refuse to pay over at the times and in the manner herein provided the net earnings or surplus thereof remaining after making disbursements, as hereinbefore authorized, to the party of the first part, or shall fail promptly to pay the interest due on said bonds hereinbefore mentioned, or in case the party of the second part shall fail or refuse to furnish the necessary rolling stock or equipment required to do the business aforesaid, whereby the business of said road might be

diminished or whereby the party of the first part may become liable for any damages or penalties resulting from the failure to do said business as aforesaid, or shall fail to pay all damages resulting from the management of said railway or property, or any taxes, assessments, penalties, fines, or forfeitures imposed by governmental authority, and in case said party of the second part shall be and remain in default upon or in respect to any of the particulars above defined for the space or term of sixty days after written notice from the said party of the first part, then and thereupon said party of the first part may elect, at its option, to terminate this contract, reserving any and all rights that said party of the first part has or may have to claim for damages by reason of such default of the second party.

Art. VII. If any difference shall arise between the parties
43 hereto in relation to the terms of this lease and contract or in relation to any matter, cause, or thing arising hereunder, then each of the parties hereto shall select a disinterested referee of experience and skill in railway management, and the said referee shall select another of like skill and experience, and the three so chosen shall hear and decide such differences, and their decision in writing, or that of a majority of them, shall be final and conclusive upon the parties hereto; and in case either of said parties shall fail to appoint a referee as aforesaid for a period of twenty days after written notice given by the other party to make such appointment, then and in that event the referee appointed by the party not in default shall appoint a referee of like experience and skill for the defaulting party, and the two referees so appointed shall select the third referee, and the three so chosen shall hear and determine such difference, and their decision in writing, or that of a majority of them, shall be final and conclusive upon all the parties hereto.

Art. VIII. No assignment or transfer of this lease to any person or corporation shall be made by the party of the second part without the consent in writing of the party of the first part. Further consolidation of the second party hereto with other railway companies shall not be construed as a transfer of this lease.

Art. IX. The party of the second part takes this lease subject to the contract existing between the party of the first part and the Des Moines and Fort Dodge Railroad Company, and the contract be-
44 tween the party of the first part and the Western Union Telegraph Company, referred to in the contract of December 8th, 1880, above mentioned, and agrees either to carry out the same or to save the party of the first part harmless therefrom.

Art. X. This contract of lease shall take effect as of the eighth day of December, 1880, and, inasmuch as it is not convenient at present for the party of the second part immediately to take possession of said railroad, it is agreed by the party of the second part that the road may, until the second party otherwise elects, be run and operated by the party of the first part as it has been from the 8th day of December, 1880, as the agent of the party of the second part, the party of the first part agreeing to account to the party of

the second part for the income and expenses of the operation of same.

In witness whereof the said parties to these presents have caused their respective corporate seals to be hereto affixed and these presents to be signed by their respective presidents and the execution thereof to be attested by their respective secretaries on the day and year first above written.

DES MOINES NORTHWESTERN RAILWAY COMPANY,

[SEAL.] By J. S. POLK, *President.*

Attest: JOHN S. RUNNELLS, *Secretary.*

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY,

[SEAL.] By SOLON HUMPHREYS, *President.*

Attest: JAMES F. HOW, *Secretary.*

45 STATE OF IOWA, } ss:
County of Polk, }

Be it remembered that on this 18th day of April, 1881, personally came before me, the undersigned, a notary public within and for the county aforesaid, J. S. Polk, who, being by me duly sworn, did depose and say that he is the president of the Des Moines Northwestern Railway Company in the foregoing instrument mentioned; that the name of said company is signed to said instrument by him, as president of said company, by virtue of the order of the board of directors; that the seal of the company attached thereto is the proper and genuine seal of said company and is affixed thereto by order of said board of directors; and the said J. S. Polk, as president, acknowledged the foregoing instrument to be the act and deed of the Des Moines Northwestern Railway Company for the uses and purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed my notarial seal of office this 18th day of April, 1881.

C. HUTTENTOCHE,
Notary Public.

STATE OF IOWA, } ss:
County of Polk, }

Be it remembered that on this 18th day of April, 1881, personally came before me, the undersigned, a notary public within and for the county aforesaid, John S. Runnells, who, being by me duly sworn, did depose and say that he is the secretary of the Des Moines Northwestern Railway Company in the foregoing instrument mentioned; that he countersigned the said instrument and affixed
46 the seal of said company thereto by order of the board of directors thereof.

In witness whereof I have hereunto set my hand and affixed my notarial seal of office this 18th day of April, 1881.

C. HUTTENTOCHE,
Notary Public.

SUB-EXHIBIT F No. 59.

Mortgage—Des Moines Northwestern Railway Company.

This indenture, made and entered into this twenty-eighth day of February, A. D. 1881, by and between the Des Moines Northwestern Railway Company, party of the first part, and the Central Trust Company of New York and James Cheney, of Indiana, as trustees, joint parties of the second part, witnesseth:

Whereas, by the terms of a contract made and entered into on the eighth day of December, A. D. 1880, by and between the Des Moines Northwestern Railway Company, of the first part, and the Narrow-Gauge Railway Construction Company, of the second part, and the Wabash, St. Louis and Pacific Railway Company, of the third part, reference thereto being hereby made, it is, among other things, mutually provided and agreed that the railroad of the said Des Moines Northwestern Railway Company shall, under and in pursuance of said agreement, and subject to the limitations thereof, and of a contract of the same date entered into by and between the Wabash, St. Louis and Pacific Railway Company and the Narrow-Gauge Railway Construction Company, be extended northwesterly from Panora, Guthrie county, Iowa, the present northern terminus of its completed road, to Sioux City and Spirit Lake, or in that vicinity, and from Waukee, its present southern terminus, to the city of Des Moines, Iowa; and

47 Whereas, in and by said agreement, it is further provided that the bonds of the Wabash, St. Louis and Pacific Railway Company of the series secured by the general mortgage of that company dated the first day of June, A. D. 1880, may be issued and used in pursuance of said agreements to the amount of seven thousand dollars per mile of the railroad of said Des Moines Northwestern Railway Company, now complete, and to the further amount of seven thousand dollars per mile for each mile of said railway which may be hereafter completed under said agreement northwesterly from Panora, and for the further sum of seven thousand dollars per mile of said extension from Waukee to the city of Des Moines, or so much more as may be necessary to complete such last-named extension; and

Whereas, in and by said agreement, it is further provided that the said Des Moines Northwestern Railway Company shall secure the bonds of said Wabash, Saint Louis and Pacific Railway Company, issued under its general mortgage above referred to, by a first mortgage upon its railroad and other property to the extent of seven thousand dollars for each mile of its said railroad now complete, and to the further extent of seven thousand dollars for each mile of said railroad as the same may be extended northwesterly from Panora aforesaid, and to the further sum of seven thousand dollars per mile of said extension from Waukee to the city of Des Moines, and so much more as may be necessary to complete said last-named extension; and

Whereas the said Wabash, Saint Louis and Pacific Railway Company is about to issue, in pursuance of said agreement, certain of its bonds secured by its said general mortgage:

48 Now, therefore, in consideration of the foregoing and to further secure the holders of the bonds issued under the provisions of the said general mortgage made as aforesaid by the said Wabash, Saint Louis and Pacific Railway Company to the extent of only of so many of said bonds as may be actually issued to the party of the first part under said contract of December eight, A. D. 1880, the Des Moines Northwestern Railway Company by this indenture doth grant, bargain, sell, convey, and transfer unto the said Central Trust Company of New York and James Cheney, of Indiana, as trustee, and to their successors in trust all its real estate necessary for and used in the operation of said roads, its right of way, embankments, bridges, turn-outs, side tracks, buildings and structures, water-tanks and fixtures, shops, engine and other houses, depots, turn-tables, engines, cars, machinery, tools, and all its railroad property acquired and to be acquired and everything appurtenant thereto or used in connection therewith, together with all rents, issues, tolls, and earnings accruing to said party of the first part: Provided, That if, as to any lots or lands parcel of said real estate and not within the actual right of way of said railroad (the same being one hundred feet in width, except where narrowed by a street), the president for the time being of the Wabash, St. Louis and Pacific Railway Company shall unite with the first party hereto in a conveyance of the same, then such conveyance shall be taken as conclusive evidence that said lots or lands are not necessary for or used in the operation of said railroad.

49 And the Des Moines Northwestern Railway Company covenants and agrees to and with the trustees named in said general mortgage executed by the Wabash, St. Louis and Pacific Railway Company and their successors in said trust that all its railroad and property above described shall be charged with the lien of said general mortgage and subject to its provisions, as hereinafter mentioned, to the extent and amount of seven thousand dollars for each mile of its railroad now constructed or to be constructed, as herein provided for, and to such further extent as said bonds may be beyond seven thousand dollars per mile used in the construction of said railroad from Waukee to Des Moines, as provided for in said contract of December 8th, A. D. 1880:

Provided, however, That if the party of the first part shall well and truly pay or cause to be paid to the parties of the second part an amount equal to the interest on said bonds so advanced to it under said contract of December eighth, A. D. 1880, according to the tenor and effect of said bonds, and an amount equal to the principal of said bonds at the date of the maturity thereof, then this obligation shall be null and void and no foreclosure of this mortgage shall take place or be had, even though in the mean time the general mortgage herein referred to may be foreclosed on other railroads and property covered by it.

In witness whereof the said Des Moines Northwestern Railway Company has caused this instrument to be signed in its corporate

name by J. S. Polk, its president, and attested by John S. Runnells, its secretary, with the corporate seal of the company hereto,
50 as authorized and directed by its board of directors, the day and year first above written.

DES MOINES NORTHWESTERN RAILWAY COMPANY,
[SEAL.] By J. S. POLK, *President.*
Attest: JOHN S. RUNNELLS, *Secretary.*

STATE OF IOWA, } ss:
County of Polk, }

Be it remembered that on this 18th day of April, 1881, personally came before me, the undersigned, a notary public within and for the county aforesaid, J. S. Polk, who, being by me duly sworn, did depose and say that he is the president of the Des Moines Northwestern Railway Company in the foregoing instrument mentioned; that the name of said company is signed to said instrument by him as president of said company by virtue of the order of the board of directors; that the seal of the company attached thereto is the proper and genuine seal of said company and is affixed thereto by order of said board of directors, and the said J. S. Polk, as president, acknowledged the foregoing instrument to be the act and deed of the Des Moines Northwestern Railway Company for the uses and purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed my notarial seal of office this 18th day of April, 1881.

C. HUTTENLOCHE,
Notary Public.

51 STATE OF IOWA, } ss:
County of Polk, }

Be it remembered that on this 18th day of April, 1881, personally came before me, the undersigned, a notary public within and for the county aforesaid, John S. Runnells, who, being by me duly sworn, did depose and say that he is the secretary of the Des Moines Northwestern Railway Company in the foregoing instrument mentioned; that he countersigned the said instrument and affixed the seal of said company thereto by order of the board of directors thereof.

In witness whereof I have hereunto set my hand and affixed my notarial seal of office this 18th day of April, 1881.

C. HUTTENLOCHE,
Notary Public.

Filed for record April 28th, 1882, and recorded in Book 104, p. 446, of Polk County Records.

52 Indorsement: The Des Moines & Ft. Dodge R. R. Co. *vs.* The Wabash, St. Louis & Pacific Railway Company *et al.* Petition of intervention of Des Moines — Ft. Dodge R. R. Co. Filed May 16, 1885, by leave of court. Ed. R. Mason, clerk.

53 And on the 16th day of May, 1885, in the records of the proceedings in said court is an entry in said cause in the words and figures following, to wit:

54 United States Circuit Court, District of Iowa, Central Division
May Term, 1885, Saturday, May 16th, 1885.

WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*
} No. 2051. Eq.

and

CENTRAL TRUST COMPANY OF NEW YORK *et al.*
vs.
WABASH, ST. LOUIS AND PACIFIC RAILWAY CO. *et al.*
} Cross-Bill.

In the matter of the petition of the Des Moines & Ft. Dodge R. R. Co. to intervene and for leave to make the receivers herein defendants to bill of intervention.

And now comes on to be heard the petition of the Des Moines & Ft. Dodge R. R. Co. for leave to intervene in this cause and for leave to make the receivers herein defendants in the petition of intervention.

Receivers Solon Humphreys and Thomas E. Tutt and the Wabash, St. Louis and Pacific Railway Company appearing by Runnells & Walker and the Central Trust Company appearing by Messrs. Phillips & Steward, their counsel, and the Des Moines and Northwestern Railway Company appearing by J. S. Polk, Esq., and the petitioners, The Des Moines & Ft. Dodge R. R. Company, appearing by Nourse & Kauffman, their solicitors, and the same being submitted to the court, and the court being advised in the premises, it is ordered that leave be granted to the Des Moines and Ft. Dodge R. R. Company to file said petition of intervention herein
55 and to make the receivers defendants therein, and it is ordered further that the defendants in said petition of intervention plead to the said petition by the August rule day of this court, and that issue be joined upon the said petition of intervention under the rules of chancery practice of the court; that the matter of reference and the taking of evidence in the cause be subject to the further order of the court or the judge in vacation.

(Signed) J. M. LOVE, *Judge.*

56 And on the 31st day of July, 1885, the Central Trust Company of New York, by Butler, Stillman and Hubbard and Phillips and Stewart, its solicitors, filed in said cause an answer to said intervening petition; which said answer is in the words and figures following, to wit:

57 In the Circuit Court of the United States for the Southern District of Iowa, Central Division.

WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY
against
THE CENTRAL TRUST COMPANY OF NEW YORK and JAMES CHENEY and Others.

THE DES MOINES AND FORT DODGE RAILROAD COMPANY
against
THE DES MOINES NORTHWESTERN RAILWAY COMPANY, THE Wabash, St. Louis and Pacific Railway Company, The Central Trust Company of New York and James Cheney, of Indiana, Trustees, &c.; Solon Humphreys and Thomas E. Tutt, Receivers, and Others.

58 The answer of the Central Trust Company of New York and James Cheney, trustees, &c., to the intervening petition of the Des Moines and Fort Dodge Railroad Company in the matter above entitled.

Now comes the Central Trust Company, trustee, one of the parties above named, and admits that the Des Moines and Fort Dodge Railroad Company is a corporation, as stated in said intervening petition, and that the Des Moines Northwestern Railway Company is also a corporation and was formerly known by the name and style of the Des Moines, Adel and Western Railroad Company, and admits that on or about the 28th day of February, 1881, the Des Moines Western Railway Company made a lease to the Wabash, St. Louis and Pacific Railway Company, substantially as stated in said petition; and admits that the company last mentioned took possession of and managed the leased property until Solon Humphries and Thomas E. Tutt were appointed receivers, as is mentioned in said petition; and admits that the Wabash, St. Louis and Pacific Railway Company advanced or furnished its bonds, secured by its general mortgage of June 1st, 1880, for the extension or construction of the road of said Des Moines Northwestern Railway Company, at the rate and to the amount of $7,000 of said bonds for each mile, as in said petition stated; and admits that the Des Moines Northwestern Railway Company, on or about the 28th day of February, 1881, mortgaged its property to the Central Trust Company of New York, trustee, to secure the payment of said bonds so issued, at the rate of $7,000 per mile, principal and interest, and that said mortgage was duly recorded.

59 The said Central Trust Company, further answering, admits and avers that on or about June 1st, 1880, the said Wabash, St. Louis and Pacific Railway Company made, executed, and delivered its bonds, known as its "general mortgage bonds," of the series hereinbefore mentioned, in pursuance of certain resolutions approved by its stockholders, whereby said company was authorized to issue said bonds and to secure the same by deed of trust or mortgage covering the entire property and franchises of said Wa-

bash, St. Louis and Pacific Railway Company, as then held or thereafter to be acquired, so that, as to future acquisitions by said last, mentioned company, said mortgage should be a lien inferior only to such liens as might be specifically charged upon the property acquired at or prior to the acquisition by said company thereof, and which should be assumed by said company as part of the condition of said acquisition.

That for the purpose of securing the payment of said bonds and in pursuance of the authority given by said resolutions the said Wabash, St. Louis and Pacific Railway Company, on or about June 1st, 1880, mortgaged and conveyed all its property to the Central Trust Company, as trustee, by a mortgage or deed of trust, which is more fully set out in the suit in which the said intervening petition is filed; and the said trust company further shows, upon information and belief, that the mortgage last mentioned was duly filed for record and recorded in the counties of Polk, Dallas, and Guthrie, in the State of Iowa (and elsewhere), before the time when the agreement of November 18th, 1879, which is set out in said petition, was filed for record or recorded.

The said Central Trust Company, further answering, says that it has no knowledge or information sufficient to enable it to form
60 a belief whether or not the agreement mentioned in said intervening petition was made, as therein set forth, between the Des Moines Northwestern Railway Company, the Narrow-Gauge Railway Construction Company, the Wabash, St. Louis and Pacific Railway Company.

The said Central Trust Company, trustee, further answering, says that it has no knowledge or information, save from the allegations of said intervening petition, whether an agreement between the Des Moines and Fort Dodge Railway Company, the petitioner, and the Des Moines Northwestern Railway Company, as set forth in said petition or otherwise, was made on the 18th day of November, 1879, or at any other time, but the said respondent, The Central Trust Company, is advised and believes and avers that if such agreement was made it was void as contrary to public policy and is in conflict with the statutes of the State of Iowa which regulate the subject of traffic arrangements between railroad companies and agreements between companies operating railroads in the same direction.

The said respondent, The Central Trust Company of New York, has no knowledge, save from the statements of said petition, whether the said Des Moines & Fort Dodge Railroad Company ever performed or attempted to perform the said agreement alleged to have been made November 18th, 1879; but the respondent is advised and believes and avers that if such performance was made or attempted the said Des Moines and Fort Dodge Railroad Company thereby subjected itself to penalties under the said statutes of the State of Iowa.

The said respondent, The Central Trust Company of New York, on its information and belief, denies that the alleged contract of November 18th, 1879, or any damages for the breach of the
61 same, ever became or were a continuing lien or any lien upon

the road of the Des Moines, Adel & Western Railroad Company or of the Des Moines Northwestern Railway Company, its income or equipment between Waukee and Panora or elsewhere, & denies that said Co. was damaged the sum claimed or any other sum.

Wherefore the said Central Trust Company prays that the said intervening petition be dismissed.

(Signed) CENTRAL TRUST COMPANY OF NEW YORK &
JAMES CHENEY,
By BUTLER, STILLMAN & HUBBARD &
PHILLIPS & STEWART, *Sol's.*

Indorsement: In the circuit court of the United States for the southern district of Iowa, central division. Wabash, St. Louis and Pacific Railway Company *vs.* The Central Trust Company of New York and James Cheney *et al.* The Des Moines & Fort Dodge Railroad Company, intervener. Answer of Central Trust Company & James Cheney. Filed Jul. 31, 1885. Ed. R. Mason, clerk. Butler, Stillman & Hubbard & Phillips & Stewart, sol's.

62 And on the 3rd day of August, 1885, the defendants, The Wabash, St. Louis and Pacific R'y Co., and Solon Humphreys and Thos. E. Tutt, receivers of said r'y Co., by Runnells and Walker, their solicitors, filed in said cause a demurrer to said intervening petition; which said demurrer is in the words and figures following, to wit:

63 In the Circuit Court of the United States for the Southern District of Iowa, Central Division.

THE DES MOINES — FORT DODGE RAILROAD COMPANY *vs.* THE DES MOINES NORTHWESTERN RAILWAY Company The Wabash, St. Louis Pacific Railway Company, The Central Trust Company of New York, and James Cheney, of Indiana, Trustees, &c., Solon Humphreys, Thomas E. Tutt, Receivers, *et al.*	Intervention in Case No. 2051, Eq. Demurrer.

Come now the defendants, The Wabash, St. Louis & Pacific Railway Company, and Solon Humphreys and Thomas E. Tutt, receivers of said Wabash, St. Louis & Pacific Railway Company, and demur to plaintiff's petition herein on the ground that the contract sued on is against public policy, and is therefore void.

(Signed) RUNNELLS & WALKER,
Solicitors and Counsel for Def'ts, W., St. L. & P. R. Co. & Solon Humphreys & Thomas E. Tutt, Receivers of W., St. L. & P. R. Co.

We hereby certify that, in our opinion, the foregoing demurrer is well founded in point of law.

(Signed) RUNNELLS & WALKER,
Solicitors and Counsel for Def'ts, W., St. L. & P. R. Co. and Solon Humphreys & Thomas E. Tutt, Rec'rs of W., St. L. & P. R. Co.

64 STATE OF IOWA, } ss:
Polk County, }

C. F. Meek, being duly sworn, deposes and says that he is division superintendent at Des Moines of the defendant, The Wabash, St. Louis and Pacific Railway Company, and is in that capacity in the employ of the defendants, Solon Humphreys & Thomas E. Tutt, receivers of the Wabash, St. Louis and Pacific Railway Company, and that the foregoing demurrer is not interposed for delay.

(Signed) C. F. MEEK.

Subscribed and sworn to before me by the said C. F. Meek in Polk Co., Ia., this 3rd day of August, 1885.

[SEAL.] (Signed) FOSHAY WALKER,
Notary Public, Polk Co., Iowa.

Indorsement: In the circuit c't of the U. S. for the S. D. of Ia., C. D. Intervention in 2051, eq. Des M. & Fort D. R. Co. *vs.* W., St. L. & P. R. Co. *et al.* Demurrer of W., St. L. & P. R. Co. & Solon Humphreys & Thos. E. Tutt, rec'rs, &c. Filed Aug. 3, 1885. Ed. R. Mason, clerk. Runnells & Walker, sol's & counsel for W., St. L. & P. R. Co. & its receivers.

65 And on the 3rd day of August, 1885, the Des Moines Northwestern R'y Co., by J. S. Polk, its solicitor, filed in said cause a demurrer to said intervening petition; which said demurrer is in the words and figures following, to wit:

66 In the Circuit Court of the United States in and for the Southern District of Iowa.

THE WABASH, ST. LOUIS & PACIFIC R'Y CO., Pl't'f, }
vs.
THE CENTRAL TRUST CO. OF NEW YORK *et al.*, Def't. }

The demurrer of the Des Moines Northwestern Railway Company to the petition of intervention filed herein by the Des Moines & Ft. Dodge Railway Company against the Wabash, St. Louis & Pacific Railway Company, the Des Moines Northwestern Railway Company, *et al.*

The Des Moines Northwestern Railway Company, by protestation, not confessing or acknowledging all or any of the matters and things in the said petition of intervention contained to be true in manner and form as the same are therein set forth, doth demur thereto, and for cause of demurrer shows—

1. That the defendant is not a necessary party herein, and is im-

properly joined as defendant with the Wabash, St. Louis & Pacific Railway Company in said petition of intervention.

2. That this court has no jurisdiction over this defendant touching the matters set out in said intervening petition, both the petitioner and defendant being citizens of the State of Iowa.

3. That the pretended contract set up between the Des Moines, Adel & Western Railway Company and petitioner is in violation of the statutes of the State of Iowa and contrary to public policy, and should not be enforced by this court.

67 That said contract was made without authority, and is *ultra vires* & void.

Wherefore, for these and divers other errors and imperfections, this defendant demands the judgment of this court whether it shall be compelled to make any further or other answer to the said petition of intervention or any of the matters and things therein contained, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

DES MOINES NORTHWESTERN RAILWAY CO.,

(Signed) By J. S. POLK.

J. S. POLK,
Counsel for Def't.

I, J. S. Polk, counsel for the defendant, The Des Moines Northwestern Railway Company, do certify that in my opinion the foregoing demurrer is well founded in point of law.

(Signed) J. S. POLK.

STATE OF IOWA, }
Polk County, } *ss:*

I, J. S. Polk, do state on oath that I am the president of the defendant, The Des Moines Northwestern Railway Company, and that the foregoing demurrer to the petition of intervention of the Des Moines and Ft. Dodge Railway Company is not interposed for delay.

(Signed) J. S. POLK.

Subscribed and sworn to before me by J. S. Polk this 3rd day of August, 1885.

(Signed) JOHN D. JORDAN,
[SEAL.] *Notary Public, Polk County, Iowa.*

68 Indorsement: The Wabash, St. Louis & Pacific R. R. Co. *vs.* The Central Trust Company of New York *et al.* Demurrer of the Des Moines Northwestern R'y Co. to the petition of intervention of the Des Moines & Ft. Dodge R'y Co. Filed Aug. 3, 1885. Ed. R. Mason, clerk. J. S. Polk, counsel for D. M. N. W. R'y Co.

69 And on the 14th day of August, 1885, the Des Moines & Ft. Dodge R'y Co., intervener, by Nourse & Kauffman, its solicitors, filed in said cause a general replication to the answer of the Central Trust Company; which said replication is in the words and figures following, to wit:

70 In the Circuit Court of the United States, District of Iowa.

WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY
vs.
THE CENTRAL TRUST COMPANY OF N. Y. & JAMES CHENEY *et al.*, Def'ts. } No. —. Equity.

In the Matter of the Petition of Intervention of the Des Moines & Ft. Dodge R. R. Company.

General Replication to the Answer of the Trust Company of N. Y. and James Cheney.

This repliant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith that he will aver and prove his said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in
71 and by his said bill he hath already prayed.

(Signed) NOURSE & KAUFFMAN,
Solicitors for Complainant.

Indorsement: Wabash, St. Louis and Pacific Railway Company *vs.* The Central Trust Company of N. Y. & James Cheeney. In the matter of the intervention of the Des Moines & Ft. Dodge R. R. Company. General replication to answer of Trust Company & Cheeney. Filed Aug. 14, 1885. Ed. R. Mason, clerk. Nourse & Kauffman, sol's for Des Moines & Ft. Dodge R. R. Co.

72 And on the 7th day of September the intervener, by Nourse & Kauffman, solicitors, filed in said cause a motion to set down the demurrers filed to the intervening petition herein for hearing; which said motion is in the words and figures following, to wit:

73 WABASH, ST. LOUIS & PACIFIC RAILWAY CO.
vs.
THE CENTRAL TRUST COMPANY OF N. Y. & JAMES CHENEY *et al.*

In the Matter of the Petition of Intervention of The Des Moines & Ft. Dodge Railroad Company.

In this cause the demurrer, filed Aug. 3, 1885, to the petition of intervention by the Des Moines and Northwestern R. R. Company & the Wabash, St. Louis & Pacific Railway Company are set down for hearing under the rules.

(Signed) NOURSE & KAUFFMAN,
Sol's for the Des Moines & Ft. Dodge R. R. Co.

Indorsement: Wabash, St. Louis & Pacific Railway Company *vs.* The Central Trust Company of New York & James Cheeney. In the matter of the intervention of the Des Moines & Ft. Dodge R. R. Company. Notice of setting down for hearing of demurrer to the petition of intervention. Filed Sep. 7, 1885. Ed. R. Mason, clerk. Nourse & Kauffman, sol's for Des Moines & Ft. Dodge R. R. Co.

74 And on the 7th day of September, 1885, in the record of the proceedings of said court is a rule-day order in said cause; which said order is in the words and figures following, to wit:

75 United States Circuit Court, Southern District of Iowa, Central Division. September Rule Day, 1885.

MOMDAY, *September 7th*, 1885.

WABASH, ST. LOUIS & PACIFIC RAILWAY CO.
vs.
THE CENTRAL TRUST COMPANY *et al.* } No. 2051, Eq.

Intervening Petition, Des Moines and Ft. Dodge Railroad Company.

This day comes intervener, by Nourse & Kauffman, its solicitors, and moves the court for an order setting the above cause down for hearing. It is thereupon ordered as of course that the said intervening petition of the Des Moines & Fort Dodge Railroad Company be set down for hearing at the October term, 1885, of this court, upon the bills, answers, and replication filed herein.

76 And on the 23d day of October, 1885, the Wabash, St. Louis and Pacific R'y Co. and Solon Humphreys and Thos. E. Tutt, receivers, by Runnells & Walker, their solicitors, filed in said cause a demurrer to the intervening petition herein; which said demurrer is in the words & figures following, to wit:

77 In the Circuit Court of the United States for the Southern District of Iowa, Central Division.

THE DES MOINES & FT. DODGE RAILROAD COMPANY
vs.
THE DES MOINES NORTHWESTERN RAILway Company, The Wabash, St. Louis & Pacific Railway Company, The Central Trust Company of N. Y. & James Cheeney, of Indiana, Trustees, &c., Solon Humphreys & Thomas E. Tutt, Receivers, *et al.* } Intervention in case No. 2051, Eq.

The demurrer of the defendants, The Wabash, St. Louis & Pacific Railway Company & Solon Humphreys & Thomas E. Tutt, receivers of said Wabash, St. Louis & Pacific Railway Company.

Come now the defendants, The Wabash, St. Louis & Pacific Railway Company & Solon Humphreys & Thomas E. Tutt, receivers of

said Wabash, St. Louis & Pacific Railway Company, and demur to the petition of intervention of the Des Moines — Ft. Dodge Railroad Company herein on the following grounds:

First. The pretended contract sued on is against public policy.

Second. Said pretended contract is against and in violation of the statutes of the State of Iowa.

Third. Said pretended contract is *ultra vires.*

Wherefore, for these and divers other errors and imperfections, these defendants demand the judgment of this court whether they shall be compelled to make any further or other answer to
78 the said petition of intervention or any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

(Signed) RUNNELLS & WALKER,
Solicitors and Counsel for Def'ts, W., St. — P. R. Co. and Solon Humphreys & Thomas E. Tutt, Receivers of W., St. L. & P. R. Co.

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

(Signed) RUNNELS & WALKER,
Solicitors and Counsel for Def'ts, W., St. L. & P. R. Co. and Solon Humphreys and Thomas E. Tutt, Receivers of W., St. L. & P. R. Co.

STATE OF IOWA, } ss:
Polk County, }

C. F. Meek, being duly sworn, deposes and says that he is division superintendent, at Des Moines, of the defendant, The Wabash, St. Louis & Pacific Railway Company, and is in that capacity in the employ of the defendants, Solon Humphreys and Thomas E. Tutt, receivers of the said Wabash, St. Louis and Pacific Railway Company, and that the foregoing demurrer is not interposed for delay.

—— ——.

Subscribed and sworn to before me by the said C. F. Meek, in Polk county, Iowa, this — day of October, 1885.

—— ——.

79 Indorsement: Circ't c't of U. S., S. D. of Ia., C. D. Intervention in case No. 2051, eq. Des M. & Ft. D. R. R. Co. *vs.* W., St. L. & P. R. Co. *et al.* Demurrer of W., St. L. & P. R. Co. & its receivers. Filed Oct. 23, 1885. Ed. R. Mason, clerk. Runnells & Walker, att'ys for W., St. L. & P. R. Co. and its rec'rs.

80 And on the 5th day of November, 1885, in the record of the proceedings of said court is an entry in said cause in the words and figures following, to wit:

81 United States Circuit Court, Southern District of Iowa, Central Division. October Term, 1885.

THURSDAY, *November 5th*, 1885.

WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY
vs.
THE CENTRAL TRUST COMPANY *et al.* } No. 2051, Eq.

This cause came on this day for hearing on the intervening petition of the Des Moines & Ft. Dodge R. R. Co.

Intervener appears by Nourse & Kauffman, solicitors, and the Wabash, St. Louis and Pacific Railway Co. & receivers, by Runnells & Walker, solicitors, and the Des Moines & Northwestern R'y Co., by J. S. Polk, solicitor, and thereupon the demurrers of said Wabash, St. Louis & Pacific Railway Company *et al.* and the Des Moines & Northwestern Railway Co. were submitted to the court as per stipulation of parties filed.

82 And on the 12th day of November, 1885, in the records of the proceedings of said court is an entry in said cause in the words and figures following, to wit:

83 United States Circuit Court, Southern District of Iowa, Central Division. October Term, 1885.

THURSDAY, *November 12th*, 1885.

WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY
vs.
CENTRAL TRUST COMPANY *et al.* } No. 2051, Eq.

This cause came on this day for hearing, and, on motion of J. S. Polk, solicitor, it was ordered that the Des Moines & Northwestern Railway Company have leave to amend the demurrer heretofore filed to the intervening petition of the Des Moines & Ft. Dodge Railroad Company.

84 And on the 20th day of January, 1886, a stipulation as to submission of demurrers to the said intervening petition was filed in said cause; which said stipulation is in the words and figures following, to wit:

85 In the United States Circuit Court, Southern District of Iowa, Central Division.

WABASH, ST. LOUIS & PACIFIC R. R. CO.
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*

and

PETITION OF INTERVENTION OF DES MOINES & FT. DODGE R. R. CO.
vs.
WABASH, ST. LOUIS & PACIFIC RAILROAD CO. *et al.*

On the demurrer to petition of intervention.

It is stipulated that the demurrer to the petition of intervention of Des Moines & Ft. Dodge R. R. Co. be submitted in print.

Demurrants to file printed argument by Feb'y 15, 1886.

Interveners to answer by March 15 and demurrants to reply by Ap'l 1, 1886, papers then to be sent to Judge Love for decision at May term.

Demurrants may assign additional causes of demurrer at any time before Feb'y 15th, 1886.

(Signed) RUNNELLS & WALKER,
Att'ys for Rec'rs, W., St. L. & P. R. Co. and W., St. L. & P. R. Co.

(Signed) DES MOINES NORTHWESTERN R'Y CO.,
By J. S. POLK, *Att'y.*

(Signed) NOURSE, KAUFFMAN & GUERNSEY,
Att'ys for D. & Ft. D. R. R. Co.

86 Indorsement: In the circuit court of the United States, southern district of Iowa, central division. Wabash, St. Louis & Pacific R. R. Co. *vs.* Central Trust Company of New York *et al.* Stipulation as to submission of demur. to int. pet'n Des Moines & Ft. Dodge R. R. Co. Filed Jan. 20th, 1886. Ed. R. Mason, clerk.

87 And on the 11th day of March, 1886, an amendment to the demurrer of the Wabash, St. Louis and Pacific R'y Co. and its receivers was filed in said cause; which said amendment to demur is in the words and figures following, to wit:

88 In the Circuit Court of the United States for the Southern District of Iowa, Central Division.

DES MOINES AND FT. DODGE RAILROAD COMPANY *vs.* DES MOINES NORTHWESTERN RAILWAY Company, Wabash, St. Louis and Pacific Railway Company, Central Trust Company of New York and James Cheeney, of Indiana, Trustees, &c.; Solon Humphreys and Thomas E. Tutt, Receivers, *et al.*	Intervention in Wabash Foreclosure Case. No. 2051, Eq.

Amendment to Demurrer.

Come now the defendants, The Wabash, St. Louis & Pacific Railway Company and Solon Humphreys & Thomas E. Tutt, receivers thereof, and make the following amendment to their second demurrer on file herein:

For a further ground of demurrer the said defendants say that the said pretended contract did not and could not create any lien upon the property of the defendant, Des Moines Northwestern Railway Company, or any lien that did or could bind the Wabash, St.

Louis & Pacific R'y Co. or Solon Humphreys and Thos. E. Tutt, receivers thereof.

(Signed) RUNNELLS & WALKER.

89 *Solicitors and Counsel for Defendants, Wabash, St. Louis and Pacific Railway Co. and Solon Humphreys and Thos. E. Tutt, Receivers thereof.*

We hereby certify that, in our opinion, the foregoing amendment to said demurrer is well founded in point of law.

(Signed) RUNNELLS & WALKER,
Solicitors and Counsel for Defendants, Wabash, St. Louis & Pacific Railway Company and Solon Humphreys and Thos. E. Tutt, Receivers thereof.

STATE OF IOWA, } ss:
Polk County, }

C. F. Meek, being duly sworn, deposes and says that he is superintendent, at Des Moines, of the defendant, The Wabash, St. Louis & Pacific Railway Company, having general charge of the business of said defendant in the State of Iowa, and in that capacity is in the employ of the defendants, Solon Humphreys & Thomas E. Tutt, receivers of the said Wabash, St. Louis & Pacific Railway Company, and that the foregoing amendment to said demurrer is not interposed for delay.

(Signed) C. F. MEEK.

Subscribed and sworn to before me by the said C. F. Meek, at Des Moines, in Polk county, State of Iowa, this ninth day of March, 1886.

(Signed) FOSHAY WALKER,
Notary Public, Polk Co., Iowa.

90 We hereby consent to the filing of the foregoing amendment to demurrer.

Dated this 10th day of March, 1886.

(Signed) NOURSE & KAUFFMAN,
Solicitors and Counsel for Des Moines & Ft. Dodge R. Co., Intervener.

Indorsement: Circ't c't of U. S. for S. D. of Iowa, C. D. No. 2051, eq. In matter of int. pet'n of Des Moines & Ft. D. R. Co. Am'd't to demurrer. Filed Mar. 11, 1886. Ed. R. Mason, clerk. Runnells & Walker, sol's and counsel for W., St. L. & P. R. Co. and its receivers.

91 And on the 8th day of April, 1886, a stipulation and amended articles of incorporation of the Des Moines, Adel and Western R'y Co. was filed in said cause; which said stipulation and amended articles of incorporation are in the words and figures following, to wit:

92 WABASH, ST. LOUIS & PACIFIC R. R. CO. }
vs.
THE CENTRAL TRUST COMPANY *et al.* }

In the Matter of the Petition of Intervention of the Des Moines & Ft. Dodge R. R. Co.

In this case it is stipulated that the annexed articles of incorporation of the Des Moines, Adel and Western Railroad Company, purporting to be filed for record with the secretary of state of the State of Iowa on the 16th of June, 1879, shall be submitted to the court upon the hearing of the demurs in this case, and the same shall be determined as though the same were set out and averred in the petition, and that no change or amendment was made to said articles up to and including the said 18th day of Nov., 1879.

(Signed) NOURSE, KAUFFMAN & GUERNSEY,
Att'ys for Des Moines & Ft. D. R. R. Co.
(Signed) J. S. POLK, *Att'y for Des Moines N. W. R'y Co.*
(Signed) RUNNELLS & WALKER,
Sol'rs & Counsel for D'f'ts, Rec'v'rs, & Wabash R'y Co.

93 UNITED STATES OF AMERICA, }
State of Iowa. }

I, Frank D. Jackson, secretary of state of the State of Iowa, do hereby certify that the attached instrument of writing is a true and correct copy of amended articles of incorporation of the Des Moines, Adel and Western Railroad Company, as the same appears of record in this office.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State of Iowa.

Done at Des Moines, the capital of the State, this first day of April, in the year of our Lord one thousand eight hundred and [SEAL.] eighty-six, of the Independence of the United States the one hundred and tenth, and of the State of Iowa the fortieth.

(Signed) FRANK D. JACKSON,
Secretary of State of the State of Iowa.
D. W. SMITH, *Dep'ty.*

94 *Stockholders' Meeting.*

Des Moines, Adel and Western Railroad Company (Adel).

The stockholders of the Des Moines, Adel and Western Railroad Company, to wit, John Risser, T. J. Caldwell, J. C. Michener, J. W. Russell, D. A. Blanchard, L. Lambert, T. J. Boak, J. O. Risser, T. Ashton, R. M. Lee, A. C. Hotchkiss, A. Lee, Lewis Jolly, J. Perkins, J. B. White, Cole Nole, Nole & Newton, John Novinger, Fred. F. Miller, S. J. Garoutte, Melissa Long, B. F. Lamont, C. C. Tyler, R. S. Barr, T. R. North, and E. Van Fossin, who are all the stockholders of said company, met at the office of the company in Adel, Dallas county, Iowa, on the 12th day of June, 1879, at 7½ o'clock p. m., pursuant to the following stipulation and call, to wit:

We, the undersigned stockholders in and of the Des Moines, Adel and Western Railroad Company, a corporation existing under and by virtue of the laws of the State of Iowa, and whose principal place of business is at Adel, Dallas county, Iowa, do hereby request the president and secretary of the said corporation to call a meeting of the stockholders of the said corporation, to be held at the office of North & Barr, in the town of Adel, Iowa, aforesaid, at 7½ o'clock in the afternoon of the 12th day of June, A. D. 1879, for the purpose of considering and amending the articles of incorporation of the said Des Moines, Adel and Western Railroad Company, at which time we severally agree to be present at said meeting, and we severally hereby waive all further notice of said meeting.

T. J. CALDWELL.
L. LAMBERT.
B. F. LAMBERT.
A. C. HOTCHKISS.
J. W. RUSSELL.
DON A. BLANCHARD.
J. O. RISSER.
J. RISSER.
T. J. BOAK.
J. PERKINS.
COLE NOEL.
J. C. MICHENER.
NOLE AND NEWTON.
S. J. GAROUTTE.
MELISSA LONG.
J. B. WHITE.
A. LEE.
J. NOVINGER.
FRED. MILLER.
R. M. LEE.
T. ASHTON.
LEWIS JOLLY.
C. C. TYLER.
E. VAN FOSSEN.
95 T. R. NORTH.
R. S. BARR.

The meeting being duly organized and the object thereof being fully stated by the president, it was unanimously

Resolved, That the several articles of incorporation of the Des Moines, Adel and Northwestern Railroad Company and the several amendments thereto be, and the same are hereby, modified and amended so as to read as follows, to wit:

Amended and Substituted Articles of Incorporation of the Des Moines, Adel and Western Railroad Company.

Article 1.

The name and style of this incorporation shall be the Des Moines,

Adel and Western Railroad Company, and the principal place for the transaction of its business shall be at Adel, Dallas county, Iowa, provided, however, the board of directors of said company may by resolution change the principal office and place of business from Adel to Des Moines, Polk county, Iowa.

Article 2.

The general nature of the business of this incorporation shall be the owning, constructing, and operating by itself or through other persons or corporations of a railroad with single and double tracks, with all the necessary appendages, appurtenances, branches thereto and connections therewith, and all extensions of the same that the nature and extent of its business shall require or may be deemed necessary therefor, and to purchase, own, and hold all real estate and other property necessary for the successful operation of said railroad, branches, and extensions. The main line of said road shall extend from the city of Des Moines, in Polk county, Iowa, westerly through the counties of Dallas & Guthrie, in said
96 State, to the Missouri river, and said corporation shall have all the other powers incident to such corporation, among which are—

1st. To have perpetual succession.

2nd. To sue and be sued by its corporate name.

3rd. To have a common seal which it may alter at pleasure.

4th. To render the interests of the stockholders transferable.

5th. To exempt the private property of its members from liability for corporate debts, except as herein otherwise declared.

6th. To make contracts, acquire and transfer property, possessing the same power in such respects as private individuals now enjoy.

7th. To establish by-laws and make all rules and regulations deemed expedient for the management of their affairs in accordance with law and not incompatible with an honest purpose.

Article 3rd.

The capital stock of this incorporation shall be two million dollars, which shall be divided into shares of one hundred dollars each, to be subscribed and taken under the direction of the board of directors of said incorporation, and may be paid for, at the option of said board, in real estate or other property or in work and labor done or material furnished in and about the construction of the same. The capital stock may at any time be increased or diminished to such a sum as may be deemed necessary to carry out the objects of the incorporation.

97 Article 4th.

Each person owning one or more shares of the capital stock of said incorporation shall be and become a member of such incorporation, and shall be entitled at all the meetings of the stockholders to one vote for each one hundred dollars actually paid up on the stock to be held by him, whether the same was paid in money, property, or labor.

Article 5th.

Ten per cent. of the stock subscribed shall be due and payable at the time of subscription, and the board of directors may require the payment of additional installments, not exceeding ten per cent. thereof, by giving not less than thirty days' notice in such paper or papers published in Adel, Dallas county, Iowa, as the board of directors may designate, whether the whole amount of the authorized capital has been subscribed for or not; but said installments shall not be ordered oftener than once in thirty days, unless by agreement of parties.

Article 6th.

The company shall have a lien upon all the stock subscribed for, all unpaid installments which it may enforce by sale of the stock to be made by the secretary after the same has been due thirty days and after thirty days' notice of the time and place of sale has been given in some newspaper published at the principal place of business of the incorporation, or the incorporation may at its option sue the delinquent stockholders for said unpaid installments, or the directors may declare such stock and the payment thereon forfeited.

98 Article 7.

For the payment of debts or to aid in the construction of said railroad the directors may issue preferred stock drawing interest at the rate of not more than seven per cent. per annum.

Article 8.

The board of directors shall have power to take all steps necessary to build, construct, and operate said railroad and its branches and connections, and it shall have power to borrow any sum of money necessary therefor, and pay such rate of interest therefor as may be agreed to, and cause the same to be secured by bonds, mortgages, or other instruments of writing necessary therefor, and the said board of directors may also as security thereon pledge the future gross earnings of the said company, provided such amounts, together with other debts of the company, shall not exceed two-thirds of the capital stock.

Article 9.

This incorporation shall commence on the 11th day of April, 1878, and continue for fifty years.

Article 10.

The officers of this incorporation shall consist of a board of not less than five nor more than seven directors, a majority of which shall constitute a quorum. The directors shall be elected annually by the stockholders on the first Monday in November in each year, and the said directors shall continue in office until their successors

are elected and enter upon the discharge of their duties.
99 They shall select from their own number their president, secretary, and treasurer, whose duties shall be such as generally pertain to such officers, and shall fill all vacancies in their board.

Article 11.

No person shall be elected a director of this company who is not a stockholder.

Article 12.

The affairs of this company shall be conducted by said directors, and they are as a board hereby invested with all the powers and the authority necessary to carry out the object of this incorporation as limited by these articles.

Article 13.

The board shall appoint from their own number an executive committee composed of the president and two of its members, whose duty it shall be, under the general direction of the board and between the meetings thereof, to manage the affairs of the company. A majority of the committee shall constitute a quorum to attend to business. All proceedings of the committee at any of their meetings shall be recorded in their book of records by the secretary when present. If the secretary is not present the minutes shall be signed by the committee and filed with the secretary, who shall enter the same upon his books.

Article 14.

Said board shall employ a suitable person to act as secretary of said company, to keep a full and correct account of all its
100 affairs, which shall at all times be subject to the inspection of any stockholder, and generally to perform the duties usually required of such officer. Said board are authorized to employ such other clerks, managers, and agents or employees as they may deem essential for the good of the company.

Article 15.

The treasurer shall, before entrusted with any funds of the company, give bonds and security to the satisfaction of the board of directors for the safe keeping of all moneys subject to the order of said board and for the faithful performance of his duties. He shall be charged with such duties as pertain to that officers in like corporations and shall pay out money only on the order of the board, or, if it is not in session, the order of the executive committee, upon orders signed by the president and countersigned by the secretary.

Article 16.

The private property of stockholders shall not in any event be subject to the debts of the company.

Article 17.

Certificates of stock shall not be issued to any subscriber until the whole amount has been paid thereon. Such certificates shall only be assignable on the books of the company, under such regulations as the board may adopt.

Article 18.

All deeds of conveyance of lands, all bonds for loans and mortgages, or deeds of trust given to secure the same, and all
101 other instruments required by law to be recorded shall be signed by the president and countersigned by the secretary.

Article 19.

These articles may be amended at any meeting of the stockholders, ten days' notice of such meeting having been given by publication thereof in a newspaper published at the principal place of business of said company: Provided, That a majority of all the stock subscribed shall favor said amendment. These articles may also be amended by a vote of the directors, two-thirds of the board voting therefor: Provided, however, five days' notice in writing of such meeting of the board shall be given to each member thereof, specifying the proposed amendment.

Article 20.

The affairs of this company shall be conducted by the present board of directors and officers until the next regular election of officers or until they shall resign or be removed.

We, the stockholders of the Des Moines, Adel and Western Railroad Company, do hereby agree to the foregoing modified, amended, and substituted articles of incorporation and approve the same.

T. J. CALDWELL.
D. A. BLANCHARD.
R. M. LEE.
S. J. GAROUTTE.
R. S. BARR.
LEWIS JOLLY.
JOHN RISSER.
J. O. RISSER.
JOHN NOVINGER.
FRED. MILLER.
L. LAMBERT.
NOEL & NEWTON.
B. F. LAMBERT.
T. R. NORTH.
A. LEE.
C. C. TYLER.
A. C. HOTCHKISS.
T. ASHTON.

102 STATE OF IOWA, }
Dallas County, } *ss:*

We, T. J. Caldwell and A. C. Hotchkiss, president and secretary of — Des Moines, Adel and Western Railroad Company, do hereby certify that the above and foregoing amended and substituted articles of incorporation were adopted by the stockholders of said company on the 12th day of June, 1879, at a meeting of said stockholders duly called and held at the office of North & Barr, in the town of Adel, Dallas county, Iowa, by a unanimous vote of said stockholders.

Witness our hands and the seal of said company hereunto affixed this 16th day of June, A. D. 1879.

[SEAL.] F. J. CALDWELL, *President.*

Attest: A. C. HOTCHKISS, *Secretary.*

STATE OF IOWA, }
Dallas County, }

Filed for record June 16th, 1879, at 8 o'clock a. m., and recorded in Book C of Miscellaneous Records, on page 456, &c.

J. G. HOWE, *Recorder.*

STATE OF IOWA, *ss:*

Filed for record in the office of secretary of state July 7th, 1879.

J. A. T. HULL,
Secretary of State.

103 Indorsement: Wabash, St. Louis & Pacific Railroad Co. *vs.* The Central Trust Company *et al.* Stipulation & amended articles of Des Moines, Adel & Western R'y Co. Filed Apr. 8, 1886. Ed. R. Mason, clerk.

104 And on the 18th day of May, 1886, in the record of the proceedings of said court is an entry in said cause in the words and figures following, to wit:

105 United States Circuit Court, Southern District of Iowa, Central Division. May Term, 1886.

TUESDAY, *May 18th,* 1886.

WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *vs.* THE CENTRAL TRUST COMPANY *et al.*	No. 2051, Eq. Intervening Petition of the Des Moines & Ft. Dodge Railroad Company.

This cause having been heretofore submitted to the court upon the separate demurrers filed by the Wabash, St. Louis & Pacific Railway Company and the Des Moines Northwestern Railway Company to the intervening petition of the Des Moines and Ft. Dodge Railroad Company, and the court being now fully advised in the premises, it is ordered that the said demurrers be, and the same are hereby, sustained.

To all of which said intervener, The Des Moines and Ft. Dodge Railroad Company, at the time duly excepted.

106 And on the 7th day of July, 1886, in the record of the proceedings of said court is a final decree in said cause in the words and figures following, to wit:

107 United States Circuit Court, Southern District of Iowa, Central Division. May Term, 1886.

WEDNESDAY, *July 7th*, 1886.

WABASH, ST. LOUIS & PACIFIC R'Y CO.
vs.
THE CENTRAL TRUST COMPANY *et al.*

In the Matter of the Petition of Intervention of the Des Moines & Ft. Dodge Railroad Company.

And now this cause coming on to be heard upon the demurrers of the Des Moines Northwestern Company and Solon Humphreys *et al.*, receivers, to the petition of intervention herein and in accord with the stipulation of the parties relating to the amended articles of incorporation, which are ordered to be filed by the clerk and are hereby made a part of the record in this cause, and this court, having fully considered said demurrers, doth sustain the same, and, the petitioner, The Des Moines & Ft. Dodge Railroad Company, electing not to amend or plead further, it is ordered and adjudged that said petition of intervention be dismissed with costs, and final judgment is now entered thereon accordingly; to which ruling and the sustaining of said demurrers and each of them the petitioner, The Des Moines & Ft. Dodge Railroad Company, excepts at the time and also to the rendering of judgment and prays an appeal herein to the Supreme Court; which appeal is allowed and penalty of the appeal bond fixed at five hundred dollars, and the bond is presented and approved.

Above entry O K.
POLK, *For D. M. N. W. R'y Co.*

108 (Signed) RUNNELLS & WALKER.

To the clerk:
Let the same be entered.
(Signed) J. M. L.

MEMORANDA.—This decree entered on this date by stipulation of parties as of June 10th, 1886.

109 And on the 23rd day of July, 1886, the intervener, by C. C. Nourse, its solicitor, filed in said cause directions to clerk as to transcript for Supreme Court of the U. S. in the words and figures following, to wit:

110 In the Circuit Court of the United States in and for the Southern District of Iowa, Central Division.

WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY
vs.
CENTRAL TRUST COMPANY OF N. Y., JAMES CHENEY, *et al.*

In the Matter of the Intervention of the Des Moines & Ft. Dodge R. R. Co.

The clerk will please prepare the record on appeal, & have sent to the Supreme Court the following:

1st. The petition of the Des Moines & Ft. Dodge R. R. Co. asking leave to intervene, and notices of said application.
2nd. The record entry granting leave.
3rd. The petition of intervention, together with copy of trust deed and lease set out in book of exhibits in the original suit and referred to in and made a part of the petition of intervention.
4th. The demurrer filed to petition of intervention.
5th. The stipulation and amended articles of incorporation of the Des Moines & Northwestern Railway Company filed with the stipulation.
5th. The final entry and order of the court dismissing the petition of intervention and allowing the appeal.
6th. Appeal bond and stipulation relating to the appeal.

(Signed) C. C. NOURSE,
Of Counsel for D. & Ft. D. R. R. Co.

(Endorsed:) Wabash, St. Louis & Pacific R'y Co. *vs.* Central Trust Co. of N. Y. & James Cheney *et al.* In matter of the intervention of the Des Moines & Ft. Dodge R. R. Co. Direction to clerk to make out record on appeal. Filed July 23, 1886. Ed. R. Mason, clerk.

111 And on the 23rd day of July, 1886, a stipulation as to entering decree was filed in said cause; which said stipulation is in the words and figures following, to wit:

112 In the Circuit Court of the United States in and for the Southern District of Iowa, Central Division.

WABASH, ST. LOUIS & PACIFIC RAILROAD COMPANY
vs.
CENTRAL TRUST COMPANY, N. Y., JAMES CHEENEY, *et al.*

In the Matter of the Intervention of the Des Moines & Ft Dodge R. R. Company.

It is hereby stipulated that the entry prepared by counsel and signed by the judge shall be entered as of the last May term of the

court, and that any further notice of appeal or citation is hereby waived.

(Signed) DES MOINES NORTHWESTERN R'Y CO.,
By J. S. POLK, *Att'y.*

(Signed) RUNNELS & WALKER,
Sol's & Counsel for Wabash R'y Co. and Its Rec'rs.

(Signed) NOURSE & KAUFFMAN,
For the Des Moines & Ft. Dodge R. R. Co.

[Endorsed:] Wabash, St. Louis & Pacific Railway Co. *v.* Central Trust Co. of N. Y. & James Cheeney *et al.* In matter of the intervention of the Des M. & Ft. Dodge R. R. Co. Stipulation as to entering decree. Filed Jul. 23d, 1886. Ed. R. Mason, clerk.

113 And on the 7th day of July, 1886, an appeal bond was filed in said cause; which said bond is in the words and figures following, to wit:

114 In the United States Circuit Court in and for the Southern District of Iowa, Central Division.

WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY
vs.
THE CENTRAL TRUST COMPANY *et al.*
} Appeal Bond.

In the Matter of the Petition of Intervention of the Des Moines & Ft. Dodge Railroad Company.

Know all men by these presents that the Des Moines & Fort Dodge Railroad Company, as principal, and C. N. Gilmore, as surety, are held and firmly bound unto the Wabash, St. Louis & Pacific Railway Company and such other parties as may be adversely interested in said appeal in the sum of five hundred dollars; for the payment whereof we bind ourselves, our heirs, executors, administrators, and assigns.

In witness whereof we have hereunto affixed our hands and seals this 12th day of June, A. D. 1886.

The condition of this obligation is such that whereas The Des Moines & Fort Dodge Railroad Company, intervener, in a suit in the circuit court of the United States in and for the southern district of Iowa, central division, wherein The Wabash, St. Louis & Pacific Railway Company is plaintiff and The Central Trust Company *et al.* are defendants, in which suit a final decree has been entered as to said petition of intervention, has appealed said case to the Supreme Court of the United States:

115 Now, if the said intervener shall prosecute said appeal and shall pay all costs therein adjudged to be recovered from said intervener, then this obligation to be void; otherwise to be and remain in full force and virtue.

(Signed) DES MOINES & FT. DODGE R. R. CO. [SEAL.]
By C. C. NOURSE, *Sol.* [SEAL.]
C. N. GILMORE. [SEAL.]

STATE OF IOWA, } ss:
Polk County, }

I, C. N. Gilmore, on oath state that I am a citizen of the State of Iowa and the surety on the foregoing bond; that I am worth the sum of one thousand dollars in excess of all my debts and liabilities, and that I have property in the State of Iowa, subject to execution, equal to the amount of five hundred dollars.

(Signed) C. N. GILMORE.

Sworn to before me and subscribed in my presence by the said C. N. Gilmore, at Des Moines, Iowa, this 12th day of June, A. D. 1886.

[SEAL.] (Signed) N. T. GUERNSEY,
Notary Public in and for Polk County, Iowa.

Bond approved June 14th, 1886.

J. M. LOVE, *Judge.*

(Endorsed:) # 2051, eq. Wabash, St. Louis & Pacific Railway Co. *vs.* The Central Trust Co. *et al.* Appeal bond on intervening petition of Des Moines and Fort Dodge R. R. Co. Filed July 7, 1886. Ed. R. Mason, clerk.

116 United States Circuit Court, Southern District of Iowa, Central Division.

I, E. R. Mason, clerk of said court, do hereby certify that the above and foregoing transcript contains a full, true, and complete copy of all the pleadings, proceedings, and record entries in a certain cause in the matter of the petition of intervention of the Des Moines & Ft. Dodge Railroad Company in a certain cause in said court, wherein The Wabash, St. Louis & Pacific R'y Co. is complainant and The Central Trust Company of N. Y. *et al.* are defendants, as full, true, and complete as the original of the same now remains on file and of record in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at office, in city of Des Moines, in said district, this 2nd day of October, A. D. 1886.

[Seal U. S. Circuit Court, Southern District Iowa.]

E. R. MASON,
Clerk U. S. C. C., Southern District of Ia.

Endorsed on cover: S. Iowa C. C. U. S. No. 256. The Des Moines & Ft. Dodge Railroad Company, appellant, *vs.* The Wabash, St. Louis & Pacific Railway Company *et al.* Filed October 27, 1886.

MAR 29

SUPREME COURT, U. S.

THE DES MOINES AND FORT DODGE R. R. CO.

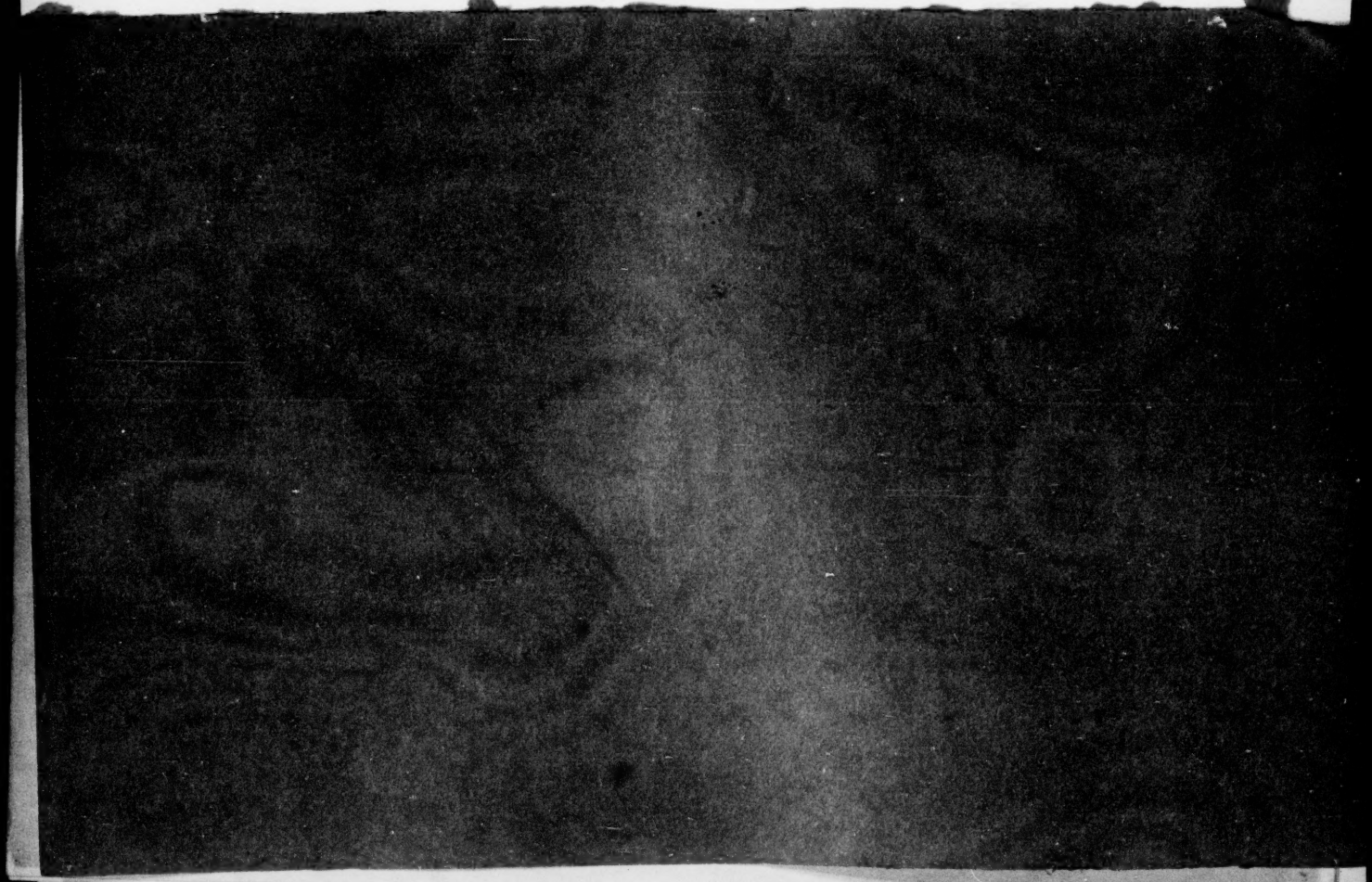
vs.

THE WABASH, ST. LOUIS AND PACIFIC R. CO. *et al.*

BRIEF OF APPELLANT.

CHAS. E. WHITEHEAD,

Of Counsel.



Hamilton Print, 12 Barclay Street, N. Y.

Supreme Court of the United States.

THE DES MOINES AND FORT DODGE RAILROAD CO.,

Appellant,

against

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY CO., *et al.*

Respondents.

BRIEF FOR THE APPELLANT.

In the foreclosure proceedings of the Des Moines, Adel and Western Railway Co., since called the Des Moines and Northwerstern Railway, which were instituted in 1885 by the respondents in the Circuit Court of the United States, for the Southern District of Iowa, the appellant sought to intervene and have its claim for damages, which was a lien upon the property, allowed and paid (fol. 8), and did set forth in full the contract between the appellant and the Des Moines, Adel and Western Ry., for the breach of which the damages were claimed (Ex. No. 2, fol. 19).

The Court granted leave to file said petition (fol. 55).

The Central Trust Co., trustee under a mortgage made by the Wabash Co., filed its answer to the petition of the respondents, setting up that the contract set out in the petition "was void as contrary to public policy" (fol. 60).

The Des Moines and Northwestern Railway Co. demurred to the petition for the same reason (fol. 67), also the Wabash Co., upon which issue was joined by replication (fol. 71). It was agreed that the matter should be submitted to the Court in print (fol. 85). It was so submitted, and the Court gave judgment May 18, 1886, sustaining the demurrers, to which order the appellant excepted, and appealed from the judgment entered thereon to this Court.

The only question presented below, and which is to be argued in this court, is, was the contract between the appellant and the Des Moines, Adel and Western Railway Co. (fol. 19) void as against public policy and statute law.

The facts of the case are as follows:

In 1879 the Des Moines Adel and Western R. R. Co., an Iowa corporation, was possessed of a narrow gauge railroad, running nearly east and west from Waukee, in Iowa, on the appellant's road, which ran north and south, to Adel, a distance of seven miles.

It subsequently, by the aid of the contract objected to, built 21 miles further to Panora and was then bankrupt, as it appears in a document executed by it a year later (fol. 24), and had to then lease its road in perpetuity (fol. 30) to the respondent.

Its charter provided (fol. 96) for "the construct-" ing and *operating by itself or through other per-* "*sons or corporations* of a railroad * * from "the city of Des Moines, Polk County, Iowa, west-

" erly through the counties of Dallas and Guthrie," " in said said State, to the Missouri River."

Being unable to build from Waukee, on the appellant's road, to Des Moines, as contemplated by its charter, it had to make arrangements to carry its freight and passengers to Des Moines, through another corporation, and the appellant's road being the only road between Waukee and Des Moines, it made a contract for the carriage of its freight and passengers from Waukee to Des Moines over that route.

The question to be decided was, whether a contract between these two companies, by which the one ennabled the other to carry out the express terms of its charter, to wit, "to operate" a railroad by itself or "through other persons or corporations," was void as against public policy.

The contract is to be judged of by the then existing circumstances. The Adel road had builded from Waukee to Adel, a distance of seven miles, and was without funds to build further; it had a chartered duty to perform to carry freight and passengers to Des Moines, and it performed it according to the exact words of its charter.

To enable it to build further towards the Missouri River it also obtained in that contract most valuable aid and pecuniary help.

The appellant agreed to and did give it on all through freight interchanged at Waukee (that is, freight to Chicago) five sevenths of the earnings, retaining for itself only two-sevenths; also on Des Moines freight two-thirds of the earnings, retaining for itself but one-third. When it is understood that the distance from Des Moines was fifteen miles, and from Waukee to Adel on the Adel road was only seven miles, the advantage of this clause to the Adel road was conspicuous.

Also the agreement provided that the Des Moines road should give the Adel road one-tenth of all its

passenger earnings derived from passengers which might come off or on to the Adel road.

Also the Des Moines road agreed to continue to account for through freight on the basis of forty per cent. of the through freight, even though afterwards its own share in the through or Chicago freight should fall below the forty per cent. which it was then receiving.

It also agreed to aid the Adel road in the further construction of its road by hauling its construction material at half-rates

In consideration of these various obligations and advantages, it was agreed that on the part of the Adel road that the Adel road should continue to give all its freight and passengers for Des Moines and places beyond to the appellant's road.

Surely such a contract, if the duration of time is not excessive, is not only void as against public policy, but it is in perfect conformity with public policy, if that term is to be construed as the encouragement of railroad building. It aided and encouraged in the most practical way the further construction of the road.

Railroad corporations in Iowa are created under a general law. There is no obligation to build the road defined in the articles of incorporation. Such articles can be modified or extended at the will of the corporators, and no penalty exists for non-performance. The corporation in question has changed its articles several times, as appears by the record (fols. 10 and 95) and one of the articles of one of its charters reads.

"Article 18. This incorporation shall be authorized by vote of its Board of Directors to make either temporary or permanent arrangements with any railroad corporation to transfer all or a part of its freight to such corporation, on such terms as may be deemed just, for such length of time as may be agreed upon."

This article is not before this Court on this demurrer, but is used only as an argument to show the general purposes of this little road were for the collection of freight to be transported by others.

It was like one of the narrow-gauge roads from the mountains centering in Denver, and great roads might well do, as they have done there, aid the narrow-gauge, on condition of getting all its business.

Even if this contract discouraged the further extension of a parallel road between Waukee and Des Moines, that might well be just, and in furtherance of public interests, because *one* road could carry freight at less cost than if *two* were employed for the same service, unless the freight exceeded the capacity of the one road. If two roads were doing the same service, they would have to charge increased rates to pay interest on the increased capital.

There can be no question that the agreement was at the date at which it was made, and, without reference to future years, a most valuable and useful and beneficial agreement. Railroads have the power to carry beyond their terminals through other corporations.

Wheeler *v.* San Francisco, 31 Cal., 46.
Bank *v.* Augusta, 49 Me., 507.
Morse *v.* Vermont Cent., 41 Vt., 550.
Stroed *v.* Hud. Riv. R. R., 5 Duer, 55.

Justice Wait, in deciding the case of the At., Topeka and S. Fe R. R., against the Denver and New Orleans R. R. Co. (110 U. S., 680), uses this language:

" At common law, a carrier is not bound to carry except on his own line, and we think it quite clear that if he contracts to go beyond, he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. His contract is equivalent to an extension

of his line for the purposes of the contract, and if he hold himself out as a carrier beyond the line, so that he may be required to carry in that way for all alike, he may, nevertheless, confine himself in carrying to the particular route he choses to use. He puts himself in no worse position by extending his route with the help of others than he would occupy if the means of transportation employed were all his own."

The objections raised against the contract are, first, and chiefly as to its extension for a *period of twenty years.*

It is clear that such an agreement would be of little value to either party for *one* year. In that time the extension could hardly have been built. In that time no accruing business would have come to the Des Moines road. Would *two* years have been sufficient to build the contemplated extension? Probably not, as, in the second year, it appears the road had only been built to Panora, a distance of twenty-one miles, and was then contracting with the Wabash to sell itself. What is, then, the period of time when such a contract ceases to be beneficial to the road and the public, and becomes restrictive and against public policy?

Can a court decide this upon a demurrer? Are not the surrounding facts and circumstances to be proven on the trial essential elements in its consideration? If the varying surroundings are to influence the mind of justice, must they not be shown on the trial of the cause? Can the Court say absolutely that no surrounding circumstances can make such a contract valid?

It is a rule of law that if two views can be taken of the intent of a contract, then the legal intent is to be accepted.

It is also a rule of law that criminality is to be adjudged only on strict proof, and that courts will act with great care and delicacy is setting aside formal contracts as illegal and void.

The Iowa court says in a like case, 26 Iowa, 191: "The power of the courts to declare a contract "void for being in contravention of sound public "policy is a very delicate and undefined power, "and should be exercised only in cases free from "doubt."

Yet, in the case at bar, this has been done on the assumption that this contract prohibited the further building of this narrow guage road.

It is to be noted that in this contract there is no restriction as to building. Also it is to be noted that the Adel Road never did build or attempt to build to Des Moines, and that it subsequently leased its property, not for twenty years, but in *perpetuity* to the Wabash road (fol. 30), and thus forever deprived itself of all power of ever building there. Its lessee subsequently transferred its business to the Des Moines and St. Louis Co., another and distinct corporation (fol. 33), where it ever since has remained.

And now comes the Wabash Co., which has swallowed up in perpetuity this little road, and turned its business over to its own creature, the Des Moines and St. Louis Co., and pleads that our contract for the delivery of its business to us was void as against law and public policy, and the Court, on abstract grounds, holds it true.

First Point.

A contract for a good and valid consideration for the delivery of the business of a public carrier to any connecting route for a period of years is valid and not opposed to public policy.

The leading case of Richmond *v.* Dubuque and Sioux City R. R. originated in Iowa. The first case tried is reported in 26 Iowa R., 191. The second is found in 33d Iowa, and the third in 40th Iowa R.,

all resulted in favor of the plaintiff below. The second case, with the same result, reached this Court, and is reported in 19 Wall, 584.

The contract there, which was criticised, was a contract on the part of an Iowa railroad corporation that an Iowa Elevator Co. should have the handling at Dubuque of all through grain passing over the railroad for a period of thirty years. The contract was carried out for a time. Afterwards the Dubuque and Sioux City leased its road to the Illinois Central and a bridge was built over the river at Dubuque and the railroad shipped its through grain directly over the bridge, thus avoiding the elevator, and the owner of the elevator brought his suit for his damages. The same defense was interposed as in this case, viz., that the contract was against public policy, and the complainants recovered, and the judgment was affirmed by this Court.

The case was much stronger than the one at bar, because there a connecting bridge had been built, and the Illinois Central R. R. had a continuous track upon it to Chicago, and the U. S. Statutes provided that bridge should be free to all railroads. In our case another road had come up to Waukee, which was to take the business contracted to us for its individual benefit. This Court, in delivering its opinion, says:

"There is no question about the power of the Dubuque and Sioux City Railroad Company to make the contract in controversy with the elevator company; and, if there were any, it would not be one within our province, upon the present appeal, to decide. The railroad company was obliged to discharge the grain it carried in its cars at the terminus of its road; and in securing the use of an elevator it provided the least expensive and the most expeditious mode for that purpose. The period for which the contract should be made, like other contracts for service, was one which rested

in the discretion of the companies. No rule of law limited the period of its continuance. The occurrence of subsequent events, rendering it of more or less value to either parties, could not effect its validity, or justify any violation of its provisions."

In the case of the Oregon Steam Navigation Co. agst. Winsor (20 Wallace, 64), a steamship was sold with a condition that it should not be used in certain waters for ten years. Suit was brought for breach of the condition; the defendants demurred, and the demnrrer was sustained below. This Court, on reversing the decision, said:

"The public was not deprived of any of the business enterprise of the country. The vendees did not incapacitate themselves from carrying on business just as they had previously done, and in the same locality. Their business was rather facilitated by the arrangement. Finally, the stipulation, it will be presumed, was founded on a valuable consideration in its influence upon the price paid."

The case of The Wiggins Ferry Co. *v.* The Chicago and Alton R. R. Co., 5th Am. and Eng. R. R. cases, 1 (73 Mo., 389), is a case in point, and involving, as it did, large sums of money, was much argued and fully decided.

The Chicago and Alton R. R. Co. had contracted with a ferry company to give to the Ferry Co. all its freight and passengers for transportation over the Mississippi River at St. Louis for a period of years. Afterwards, when a bridge was built across the river, the R. R. Co. failed to perform, and diverted its freight by the bridge. Action was brought in Missouri for damages, and the plaintiff recovered $107,000.

A second like case was brought, which the defendants sought to have removed to this court (108 U. S., 18), but this court declined to interfere and take jurisdiction.

In Ohio the like principle is decided in Himrod Furnace Co. *v.* The Cleveland and Mahoning Valley

R. R. Co., 37 Ohio, 32 (41 Am. R., 509), where that Co. was required to perform its contract, which was to carry certain freight for a period of ten years.

Terre Haute and Ind. Ry. Co., &c.,
Struble, 109 U. S., 381,

was a case where Struble recovered, in the Circuit Court of the United States, $10,440 for breach of contract by the R. R. Co., where the R. R. Co. had agreed to send all live stock coming to East St. Louis over its road to Struble's yards, and to pay him fifty cents a car therefor. This court confirmed the judgment of the Circuit Court.

Second Point.

The provision in the contract, that uniform rates shall be maintained between competitive points, is not void as against public policy.

The respondents have sought to infer that such rates, if established, would be *un* reasonable. No such inference is permissible. Unreasonable rates would be unlawful, and the intention to commit an unlawful act cannot be inferred. In this present suit, however, the contract expressly provided that the rates should be *reasonable* (fol. 22).

In the case of the Columbus, Piqua and Ind. R. R. *v.* J. and B. R. R., 5 McLean, 450, it was claimed that a contract made between the above named two companies to establish uniform rates was *ultra vires* and illegal.

The Court said: "The company may, as individuals, agree to certain rates of transportation which may be considered mutually advantageous. Neither company has parted with its corporate powers; each acts for itself, and under its own powers, as fixing the rates of transportation, and they both agree

that the charge shall be uniform thoughout the line."

In Munhall *v.* Penn. R. R. Co., 92 Penn., 150 (5 Am. and Eng. R. R. cases, 343), it was held that an agreement between the R. R. companies in regard to competitive freight was not illegal when not injurious to the public.

The case of Sayer *v* Louisville Benevolent Association, 1 Duval, 145, a case cited by the defendants as sustaining the theory that an agreement for uniform rates is unlawful. That case, however, was widely different from this. That was a suit by an association, incorporated under a special act of the Legislature of that state, to recover a penalty imposed on one of its members for carrying freight at less than the rates established by the association.

The authorities make a wide difference between the obligation of a contract between persons competent to make an agreement for their own protection, and an association or combination attempting to control prices, by inflicting penalties upon its members as a means of coercion. The Court in that case says:

" The public interest does not, we believe, forbid " carriers from guarding themselves against undue " competition and reducing the standard of fair " compensation, and we should hesitate to condemn " an agreement between carriers not to carry goods " for less than a certain reasonble price."

Between the two roads contracting there were but few competitive points possible. It is to be remembered that the articles of incorporation of the Des Moines, Adel and Western R. R., with which the contract was made, provided for a road to be built through Dallas and Guthrie Counties westerly " *to the Missouri River.*" Such a line of road was not competitive with the appellant's road, except near the junction point. It was an east and west road, while the appellant's road was a north and south road. After the Wabash obtained possession

the Adel road was diverted from its chartered course.

Third Point.

The Iowa statutes do not forbid a contract of the kind here entered into.

The 1297th section of the Iowa Code relied upon was intended to prohibit *pooling*. It forbade the dividing the joint earnings of railroads "running in the same general direction." In the side syllabus in McClain's annotated statutes of Iowa is this note: "Parallel railways cannot pool earnings."

We have already shown that the charter of the Adel road provided for its running, not in the same general direction, but in precisely the reverse direction. The appellant's road ran north and south; the Adel road was to run east and west.

Section 4087 of the same Code creates a penalty for doing any illegal act injurious to public trade. The contract was not illegal, and we have already shown it was beneficial in that it aided the feeble road to extend its line when it was without funds and bankrupt, and to carry out at once the project of its charter by reaching Des Moines, over the Des Moines road.

Fourth Point.

A contract which is void as to one part and valid as to another can be enforced as to the valid portion if the subjects are divisable.

In this case the Des Moines, Adel and Western R. R. Co. agreed, for a valuable consideration, to maintain uniform rates; also to deliver its passengers and freight to the appellant's road. These agreements were separate and divisable.

The obligation to deliver its passengers and freight was an independent stipulation, and for the breach of the valid portion the respondent was liable, even if the other or uniform rate condition of the contract should be adjudged void.

U. S. *v.* Hodson, 10 Wall, 395

Fifth Point.

Where a party has availed himself of the benefits of a contract, or of an unconstitutional law, or of a supposed contract, which, in fact, was never made because of want of power to make it, it is not permitted to him to keep the benefits and to avoid the obligation.

Union Pac. R. R. *v.* McAlpine, 129 N. S., 305.
Daniel *v.* Tearney, 102 N. S. at 421.
Burlington *v.* Gilbert, 31 Iowa, 356.

Bissel *v.* The R. R. Companies, 22 N. Y., 258, is a fully considered case.

The Adel road was chartered to carry freight and passengers to Des Moines through "other corporations." It made a contract to do so, which was good for the time being but was claimed to be invalid for future time. Nevertheless, it reaped all the benefits on its side, and then seeks to repudiate. It gets all its building materials hauled at half rates, and then, it sells out its property to the Wabash, which contracts to hold it harmless from liability, and both it and the Wabash conspiring together jointly seek to avoid the performance of the contract. Such a claim is against conscience, and deserves to have every intendment construed against it.

CHARLES E. WHITEHEAD,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

THE DES MOINES AND FORT DODGE RAILROAD COMPANY

vs.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY ET AL.

No. 256.

STATEMENT AND BRIEF ON BEHALF OF APPELLEES.

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Supreme Court of the United States.

THE DES MOINES AND FORT DODGE RAILROAD COMPANY,
Appellant,

vs.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY ET AL.

This is an appeal from a judgment entered upon the overruling of a demurrer to the intervening petition of appellant filed in the case of the Wabash, St. Louis and Pacific Railway Company vs. the Central Trust Company, James Cheney and others. The claim of the appellant is that, by virtue of a certain contract, dated November 18, 1879 (Record, p. 10), it is entitled to assert a first lien to the extent of $50,000 upon a certain line of railroad extending from Waukee to Panora (Record, p. 7). To understand this claim fully it will be necessary more carefully to state the facts disclosed by the record showing the relations of the several parties at the time this contract was entered into by the two railroad companies parties thereto, and the relation to the said contract of the other parties to this record.

The appellant, The Des Moines & Fort Dodge Railroad Company, on and prior to November 18, 1879,

owned and operated a line of railway extending from Fort Dodge to Des Moines by way of Waukee, which was of standard gauge.

On and prior to the same date, The Des Moines, Adel and Western Railroad Company (afterwards called the Des Moines Northwestern Railway Company) also owned and operated a line of railway of three-feet gauge from Waukee to Panora. Its charter line, however, as fixed by its charter, was as follows: "The main line of said road shall extend from the City of Des Moines, in Polk County, Iowa, northwestwardly through the Counties of Dallas and Guthrie in said State to the Missouri River" (Record, p. 42).

At the same time, The Chicago, Rock Island and Pacific Railway Company was operating a railway from Chicago to Council Bluffs and proposed building a branch from Guthrie, on its main line, to Guthrie Centre, in Guthrie County, Iowa. If the Des Moines, Adel and Western Railroad were constructed upon its charter route, the portion of the line from Waukee to Des Moines would be a parallel and competing line with the line of the appellant between those points, but of different gauge. At Des Moines it would connect with The Chicago, Rock Island and Pacific Railway Company's line. With this state of facts existing, the two companies entered into the contract, which is set forth in the intervening petition (Exhibit No. 2, Record, page 10), under the provisions of the 12th clause of which a lien is claimed to arise in favor of the appellant in this case. On the 8th day of December, 1880, The Des Moines Northwestern Railway Company entered into a contract with the Narrow Gauge Railway Construction Company and The Wabash, St.

Louis and Pacific Railway Company, under the provisions of which the Construction Company completed the line of railway of The Des Moines Northwestern Railway Company from Waukee to Des Moines; and in which it was provided that the said Wabash, St. Louis and Pacific Railway Company, when the said road should be constructed, should lease and thereafter operate the same (Record, page 13). On the 28th day of February, A. D. 1881, The Des Moines Northwestern Railway Company executed an indenture of lease to The Wabash, St. Louis and Pacific Railway Company of all its lines of railway, upon certain conditions therein named. Article 9 of this lease provides that "*The party of the second part* (The Wabash, St. Louis and Pacific Railway Company) *takes this lease subject to the contract existing between the party of the first part and The Des Moines and Fort Dodge Railway Company, and the contract between the the party of the first part and the Western Union Telegraph Company, referred to in the contract of December 8th, 1880, above mentioned, and agrees either to carry out the same or to save the party of the first part harmless therefrom.*" On the 28th day of February, 1881, The Des Moines Northwestern Railway Company likewise executed a mortgage to the Central Trust Company of New York and James Cheney, as trustees, to secure the holders of bonds issued under the provisions of the general mortgage of the Wabash, St. Louis and Pacific Railway Company to the said trustees, to the extent of so many of said bonds as may actually be issued for the purpose of procuring funds to make the extension of said road from Waukee to the City of Des Moines, or for the extension northwestwardly from Panora, but

not to exceed $7,000 per mile (Record, page 25). After the execution of the lease of February 28th, 1881, The Wabash, St. Louis and Pacific Railway Company began to operate the lines of railway for the Des Moines Northwestern Railway Company, but did not, in connection with such operation, transfer to the appellant company at Waukee all of its through business, as provided in the contract of November 18th, 1879. In the intervening petition it is claimed that the amount of damages caused to the appellant by the breach of this contract is the sum of $50,000, and that for that sum the appellant is entitled to have a lien prior to that of the mortgage to The Central Trust Company and James Cheney upon the part of the road between Waukee and Panora.

The demurrer to the intervening petition of the appellant raises the following objections to the enforcement of the alleged lien of the appellant.

1st. The pretended contract sued on is against public policy and void.

2d. The pretended contract is against, and in violation of the statutes of the State of Iowa.

3d. The pretended contract is *ultra vires*.

4th. The pretended contract did not and could not create any lien upon the property of the defendant The Des Moines Northwestern Railway Company, or any lien that did or could bind The Wabash, St. Louis and Pacific Railway Company, or Solon Humphreys and Thos. E. Tutt, Receivers thereof (Record, pp. 32 and 38).

The demurrer to the petition was sustained and judgment entered dismissing the petition of the appellant. The action of the Court in thus sustaining the demurrer is appealed from.

I.

The contract sued on is against public policy and void.

The purpose of the contract is evidently :

1st. The stifling of competition at Des Moines and other points by preventing the Des Moines, Adel and Western from completing its road to Des Moines (Contract, paragraph 1).

2d. The division of territory within the certain limits defined in the contract.

3d. The maintenance of uniform rates at all competitive points.

4th. The forcing the Des Moines, Adel and Western Railroad Company to deliver all its freight and passengers to the Desmoines and Fort Dodge Railway Company at Waukee, and all of its through business to the Chicago, Rock Island and Pacific Railroad Company at Des Moines, for the period of twenty years.

An examination will not fail to reveal all the foregoing elements in this contract.

Upon each and every one of the foregoing grounds it is insisted that this contract cannot be sustained. (1) *It was not competent for these companies to so contract as to prevent the Des Moines, Adel and Western Railroad Company from performing its duty to the public, which was as rapidly as possible to construct its railway as it was chartered to be built, and to operate it for the equal benefit of all the public.* But by this contract it disabled itself to thus construct and operate the portion of its line between Waukee and Des Moines for the full period of twenty years. The recital of the contract is "that the Des Moines Company, being desirous of obtaining all the Des Moines business of the Adel Company for a long term of years," &c., agrees to make certain divisions and allowances to the Adel Company out of the traffic; and, in the twelfth clause of the contract, "In consideration of the foregoing the Adel road hereby agrees to deliver to the cars of the Des Moines road at Waukee all its freight and passengers bound to Des Moines, or to any place through Des Moines and beyond, for the period of twenty years from this date."

The measure of its obligations and its powers in this respect is very comprehensively stated by this Court in Thomas vs. Railroad Co., 101 United States, at p. 83:

> "There is another principle of equal importance and equally conclusive against the validity of this contract which, if not coming exactly within the doctrine of *ultra vires* as we have just discussed it, shows very clearly that the railroad company was without the power to make such a contract.
>
> That principle is that where a corporation like a railroad company has granted to it by charter franchises intended in large measure to be exercised for the public good and the due performance of those functions being the consideration of the public grant, any contract which disables the corporation for performing those

functions which undertakes without the consent of the State to transfer to others the rights and powers conferred by the charter and relieve the grantees of the burden which it imposes, is a violation of the contract with the State and is void as against public policy."

So likewise BIDDLE, Justice, in the Board of Tippecanoe County vs. the Lafayette, &c., R. R. Co., 50 Indiana, 108, says :

"A railroad company is a *quasi* public corporation which depends on the public for its support and the public depends on it for its accommodations. Powers are granted to it that are denied to individuals or partnerships or other corporations, as those for producing, manufacturing, commercial or monetary purposes ; it has privileges which are denied to other common carriers, such as lines of ships, steamboats, or other means of the carrying trade ; it exercises the right of domain, which is an attribute of sovereignty. The power of taxation, as in the case before us, is often invoked in its aid. It is, therefore, bound by reciprocal obligations and has reciprocal duties to the public. It must not make contracts beyond its charter powers or perform acts injurious to the public or pursue a course in contravention of public policy. It is created, sustained and protected by law and wields powers with which private enterprises cannot compete. It must, therefore, obey the law and keep within its powers and pursue in its general course the end and design of its creation."

In the case of the State vs. The Hartford and New Haven Railroad Company, 29 Conn., 538,a mandamus was sought to compel the defendant railroad company to operate its railroad to tidewater to accommodate travel to and from New York by boat. The defendant set up a contract with the New York and New Haven Railroad Company in which it agreed not to operate this part of the road. The Court say, page 546 :

"This contract amounts to nothing. * * * The

whole proceeding from first to last seems to be in contravention of the charter obligations of both these companies and to present a case of odious monopoly if not of positive oppression and wrong which can receive no countenance from an impartial tribunal."

The precise question we are considering is presented in the case of the Hartford and New Haven R. R. Co. vs. the New York and New Haven R. R. Co., 3d Robertson, 411, by virtue of which the defendant, The New York and New Haven R. R. Co., by a certain contract agreed not to extend its line of railroad northerly beyond a certain point. The arrangement was intended to prevent the extension of the railroad north of its then terminus at Granby and thus prevent any competition in travel detrimental to the interests of the plaintiff's road, which had a monopoly of the carrying trade from Springfield and points north of Springfield. The completion of this railroad beyond the point stipulated would open a new line for travel southward and would be a competitor and rival of the road of the plaintiffs. The Court say at page 415:

"Such competition and rivalry it was not lawful for these parties to prevent or attempt to prevent, and any contract to effectuate such a purpose is void. Public policy is opposed to any infringement of the rights of travel or of any of the facilities which competition may furnish, and the law will not uphold any agreement which does or may injuriously affect such rights or facilities (Doolin vs. Ward, 6 John., 194; Hooker vs. Vandewater, 4 Denio, 349; Stanton vs. Allen, 5 *Id.*, 434; Shrewsbury & Birmingham R. R. Co. vs. Lond. & N. W. R. R. Co., 21 Eng. L. & E., 319; State vs. Hartf. & N. H. R. R. Co., 29 Conn., 538)."

(2) *It was also not competent for the parties to parcel the territory and seek within that territory to prevent any competition in rates by virtue of their exclusive connection*

with the Chicago, Rock Island and Pacific Railway Co. The tenth clause of the contract provides as follows:

"'The Des Moines agrees, in case any railroad shall "be built or operated by it or by the Rock Island on the "territory west of the Des Moines road, south of the "Northwestern road and east of the projected line of "the Rock Island from Guthrie Center to Guthrie, "then the Adel road may terminate this contract on "giving thirty days' notice in writing."

The evident intent of this clause of the agreement was, within the limits named, to secure this territory for the three railway companies. This is clearly an attempt, within the limits of that territory, to prevent any competition whatsoever, and therefore against public policy and void.

This question is very carefully considered and decided adversely to the claim of the appellant in the case of the Denver & N. O. R. R. Co. vs. The Atchison, T. & S. F. R. R. Co., in the 15th Federal Reporter, page 650.

Judge HALLETT, at page 655, thus characterizes a similar provision in the contract under consideration in that case:

"The Rio Grande Company also agrees in this instrument, 'not to do any through business to and from Trinidad, or to and from New Mexico via Trinidad or El Moro'; an express renunciation of a duty enjoined by the State, and therefore void. If that company can decline a part or all of the carrying business at Trinidad, it may also abandon its entire line and refuse to serve the public in any way."

Shrewsbury & B. Ry. Co. vs. London & N. W. Ry. Co., 4 De G., M. & G., 115.
S. C., 6 H. L. Cas., 113.
State vs. Hartford & N. H. R. Co., 29 Conn., 538.
Union Pac. R. Co. vs. Hall, 91 U. S., 343.

A more objectionable feature of this instrument is that in which the parties agree not to "connect with or take business from or give business to any railroad" which may be constructed in Colorado or New Mexico after its date. That is to say, these powerful corporations having secured a monopoly of the carrying business in two States, will hold it indefinitely, and refuse to recognize or deal with any rival that may enter the field.

Argument is not necessary to show that a compact of this kind is against public policy, and therefore void. Certain corporations of Pennsylvania, controlling coal produced in a large district of country, made a combination to regulate the supply and the price, which was held to be illegal. Morris Run Coal Co. vs. Barclay Coal Co., 68 Pa. St., 173. In this instance the combination is to control the carrying trade of a great country, which is of much greater importance to the people than coal."

See, also, Greenhood on Public Policy, 671.

(3) *The contract also provides that within the territory named uniform rates are to be maintained, and, if not maintained, then this contract to cease at the option of the Adel road.*

The seventh clause of the contract provides that

"Uniform rates shall be maintained by both roads at all competitive points; and both roads shall join in requiring the Rock Island to do the same, as far as able; and if the Rock Island shall persistently and continuously refuse to maintain such uniform rates in accordance with Mr. Riddle's letter of this date, which is made part of this contract, at such competitive points, then the Adel road may, by giving thirty days' notice in writing of its intention to do so, terminate this contract."

It is perfectly clear that contracts the object of which is the prevention of competition are against public policy and void.

Green's Brice's Ultra Vires, 2d Ed., 417, Note *a*.

Greenhood on Public Policy, pp. 653, 647, and cases cited.
Arnot vs. Pittston & Elmira Coal Co., 68 N. Y., 558.
Morris Run Coal Co. vs. Barclay Coal Co., 68 Penn. St., 173.
Crawford vs. Wick, 18 Ohio St., 190.
Sayer vs. Louisville Union, 1 Duvall (Ky.), 143.
Hooker vs. Vandewater, 4 Denio, 349.

(4) *The contract likewise compels the Adel road to deliver all its freight to the Des Moines, and through the Des Moines to the Rock Island, for the period of twenty years, regardless of the cost of carriage of such freight to the public, and at such prices as these two roads may see fit to fix for such service, regardless of what other companies may be willing to carry the freight and passengers for, and regardless of the wishes of the public who may ship freight over its lines.* The twelfth provision very clearly indicates that the Adel road would deliver to the Des Moines road at Waukee all freight which it would collect from the territory reached by it, and it is equally evident that this was to be at the rates fixed by the Des Moines company without competition. In this respect this company was not fulfilling the obligation which it assumed to the people of Iowa when it received its charter to build a road from Des Moines to the Missouri River, and without authority of the State was attempting to alienate that portion of its line between Waukee and Des Moines, and consequently was not fulfilling its duty to the public.

II.

The contract in question was in violation of the statutes of the State of Iowa, and therefore void.

Section 1297 of the Railway Act provides:

"It shall be unlawful for any railway company to "make any contract or enter into any stipulation with "any other railroad company running in the same gen- "eral direction by which either company shall directly "or indirectly agree to divide in any manner or pro- "portion the joint earnings upon the whole or any "part of the freight transportation over such roads. "Any violation of this provision shall render the rail- "way company violating the same liable to a penalty "of $5,000 for each month for which such earnings are "divided, to be recovered for the use of the permanent "school fund in the name of the State."

Likewise, Section 4087 of the Criminal Code provides:

"If any two or more persons conspire or confer to- "gether with the fraudulent or malicious intent wrong- "fully to injure the person, character, business or "property of another, or to do any illegal act injurious "to the public trade, health, morals or police, or to "the administration of public justice, or to commit "any felony, they are guilty of a conspiracy, and every "such offender and every person who is convicted of "conspiracy at common law shall be punished by im- "prisonment in the penitentiary not more than three "years."

It is very evident that this contract, in its first, second, third and fourth paragraphs provides for a pooling arrangement, and is therefore within the prohibition of Section 1297, because these two companies have railways runing in the same general

direction, and this is an agreement to divide, in certain arbitrary proportions, the earnings for freight transportation over their respective roads, and therefore the contract is void. It is likewise void because in violation of the prohibition of Section 4087.

The case of Hooker vs. Vandewater, *supra*, is precisely in point on this question. The Revised Statutes of New York provided that :

" If two or more persons shall conspire to commit " any act injurious to trade or commerce, they shall be " deemed guilty of a misdemeanor."

The proprietors of five lines of boats engaged in the business of transporting passengers and freight on the Erie and Oswego canals entered into an agreement among themselves to run for the remainder of the season of navigation at certain rates for freight and passage then agreed upon, and to divide the net earnings among themselves according to certain proportions fixed in the articles of agreement. The Court holds, page 353, as follows :

" It was a conspiracy between the individuals con- " tracting to prevent a free competition among them- " selves in the business of transporting merchandise, " property and passengers upon the public canals. " The question arises, is such a conspiracy to commit " such an act injurious to trade or commerce within " the meaning of the statute and therefore illegal ? " The words ' trade ' and ' commerce ' are said by Jacobs " in his law dictionary not to be synonymous ; that " ' commerce ' relates to dealings with foreign nations ; " ' trade,' on the contrary, means mutual traffic among " ouselves in the buying, selling, or exchange of articles " between members of the same community. That the " raising of the price of freights for the transportation " of merchandise or passengers upon our canals is a " matter of public concern, and in which the public " have a deep interest, does not admit of doubt. It is

" a familiar maxim that competition is the life of trade. " It follows that whatever destroys or even relaxes " competition in trade is injurious, if not fatal, to it " (The Teople vs. Fisher, 14 Wend., 9). The object of " the agreement as expressed in the written contract " was plausible enough, but it is impossible to conceal " the real intention. It is evident that the parties were " the owners of five separate and powerful lines of boats " provided for the transport of property, merchandise " and persons on the canals then in use and in active " rivalry in business, affecting more or less the price of " freights; to destroy which rivalry and keep up the " price to certain rates fixed by themselves was the " great, if not the sole, object of that agreement. The " transaction amounted, as I think, to a conspiracy to " commit an act injurious to trade, within the legal " meaning of the statute denouncing it as a crime, and " so, therefore, illegal and void."

See also Stanton vs. Allen, 5 Denio, 434.

III.

The contract did not and could not create any lien upon the property of the defendant, the Des Moines Northwestern Railway Company, or any lien that did or that could bind the Wabash, St. Louis and Pacific Railway Company, or Solon Humphreys and Thomas E. Tutt, Receivers thereof.

(a) *The agreement of November 18th, 1879, was not such an agreement as would run with the land and bind subsequent purchasers or lesses by its provisions.*

The sole question that arises under this head is as to the effect of the provision in the contract of Novem-

ber 18th, 1879, that "this contract and any damages for the breach of the same shall be a continuing lien upon the roads of the two contracting companies, their equipment and income, in whosesoever hands they may come, the lien on the Adel road being limited to so much thereof as lies between Waukee and Panora."

Does this create a covenant running with the railroads of each of the contracting parties, or is it a mere personal agreement of each?

If the former, some ground for the contention of the appellant may exist; but if the latter, then no ground whatever for such contention can be found.

It is evident that the basis of the appellant's right of action in this case is the proposition that the agreement of November 18th, 1879, was so connected with The Des Moines Northwestern Railway, that The Wabash, St. Louis and Pacific Railway Company could not acquire this railway by lease, or otherwise, without assuming with the property all the obligations of the contract. This, we insist, could not be the result of this contract. It will be observed that, by the contract, neither of the two contracting parties grants to the other any interest in its line of railway, or leases the same or any part of the same to the other.

All that they respectively agreed to do is to agree to divide the results of the operation of their respective lines, so far as respects certain business, in certain proportions, and as to other business agree to receive and deliver freight from and to each other, and to the Chicago, Rock Island and Pacific Railway Company to the exclusion of other railway companies. It would seem clear that this is a case like that of Wheelock vs. Thayer, 16 Pickering, 68, in which the Court held that a covenant

with a privilege of drawing water from a pond would not run with the land, saying, "This covenant could not run with the land, for no land was granted, and to make a covenant run with the land it is not sufficient that it is of and concerning land."

It will be further observed that the two companies remain each fully in control of its own line of railway, and the question is, therefore, whether under such conditions the contract which they made concerning the manner in which they will deal each with the other in forming connections for the transfer of business is one that can be made to bind the grantee of either of them by a simple succession of ownerships of the respective lines of railway. The contract is similar to the contract relied upon to establish a lien in case of Express Company vs. Railroad Company, 99 U. S., 191, and in which this Court held that no lien existed. The result of the authorities upon this question is very clearly stated as follows in the American notes to Spencer's Case, 1 Smith's Leading Cases :

"The proper relationship between parties and estates is not all that is necessary to ensure that a covenant shall run with the land, for the law will not permit, as has been said, new and unusual incidents to be attached to land, by way either of benefit or of burden. Keppell vs. Bailey, 2 Myl. and K., 517 : The covenant must touch or concern the land and be reasonable, and not merely a whim of the grantor. The following have been held personal covenants which would not run : That plaintiff should have exclusive right to run tubing to carry oil through other land of the grantor, Trans. Co. vs. Pipe Line Co., 22 W. Va., 600 ; that if grantee should sell the land he would sell to grantor, Maynord vs. Polhemus, 15 Pac. Rep., 451 (Cal.) ; that the grantor would not sell marl from other land retained by him, (Brewer vs. Marshall, 3 C. E. Green, 337 ; Sc., 4 *Id.*, 537) ; that

the grantor would not open quarries on land retained by him (Norcross vs. James, 140 Mass., 188); to pay mortgage debt (Glenn vs. Canby, 24 Md., 127); by grantor to pay taxes (Graber vs. Duncan, 79 Ind., 565); of mortgagor to insure (Dunlop vs. Avery, 89 N. Y., 592; Reid vs McCrum, 91 N. Y., 412); that if grantee should sell, his grantor (the covenantee) should receive one-quarter of the purchase money, because in restraint of alienation (De Peyster vs. Michael, 6 N. Y., 467); to pay grantor one-sixth of all the oil which might be produced on the granted premises; of grantee (a railroad) to carry all its passengers by the grantor's ferry (Wiggins Ferry Co. vs. O. & M. Ry. Co., 94 Ill., 83)."

A more extended notice of the points decided in some of the cases cited in the foregoing note will enforce the application of the principle contended for to the case at bar. In the case of the Transportation Company vs. The Pipe Line Company, 22 West Virginia, page 600, we have a case precisely in point. This is a case where E. L. Gale and Mary Gale made a contract with the transportation company upon a valuable consideration and agreed with that company and its assigns to grant "the right of way to construct and maintain one or more lines of tubing for the transportation of oil along, through and under lands owned by the undersigned in Ritchie County, in the State of West Virginia; and also the right to construct and maintain a telegraph along said tubing, and the privilege to remove said tubing and telegraph at pleasure." Also by a subsequent contract the same parties granted to the transportation company and its assigns "the exclusive right of way and privilege to construct and maintain one or more lines of tubing for the transportation of oil, water or other liquids along, through and under lands owned by the undersigned in Ritchie County, in the State of West Virginia;" and subsequent thereto

the Gales sold one-half of the tract of land then owned by them and known as the "Gale tract" to the Ohio River Pipe Line Company, the defendant in this suit, and this pipe line company, by contract with another company known as the Wood County Petroleum Company, undertook, upon the land purchased by them, to locate and construct tube lines for the transportation of oil, and thereupon the transportation company, relying upon their contracts with the Gales, undertook to enjoin the Petroleum Company and the Pipe Line Company from using the land in that way, insisting that their rights therein were exclusive, and that the said parties taking, with notice of these contracts, took subject to the contracts and were required to carry out the contracts which the Gales had made. The Court, in considering the question arising upon these contracts, first holds that these contracts for an exclusive right were against public policy and void; but upon the question which we are now considering as to whether or not they bound the grantee of the Gales, at page 630, thus disposes of that question:

"But even if such contract were obligatory on the "original covenantor or grantor, it could not possibly "be binding upon a grantee of the land or any other "corporation seeking a right of way through such land. "It is impossible to regard it as a covenant running "with the land, and the grantees of the land, though "they had the most explicit notice of such contract, "would not be under any obligation to fulfil it. The "effort is to construe this grant of an exclusive right "of way as the equivalent of, first, a grant by the "grantors of a right of way for tubing for the transportation of oil, which it certainly is, and, secondly, "as a contract on the part of the grantors that the corporation should, for all time, have the right to transport for legal charges, in their tubes, all the oil which "should thereafter be produced on the tract of land.

" It seems to me obvious that this second supposed " provision in this grant and contract, cannot, by any " fair interpretation be found therein; for surely under " this contract and grant the grantors would have had " a right to transport the oil produced on said tract of " land by wagon had they chosen so to do. There is " nothing in this contract which can fairly be inter- " preted to forbid their so doing. But if we were to " assume that the construction of this contract claimed " is its true construction, and that it is to be interpreted " as if it had expressly provided 'that for value re- " ceived the grantors, Gale and wife, thereby stipu- " lated that the West Virginia Transportation Company " should have a right forever thereafter, at legal " rates of charges, to transport all the oil produced on " said tract of land, and if we are to assume further " that the grantors not only covenanted for themselves, " but for their assigns to fulfil this stipulation, and still " further that the grantees of the land, the persons " known as the Wood County Petroleum Company, had " expressed notice of this covenant and its require- " ments when they purchased the land, yet my con- " clusion is that they would have been under no legal " obligation to fulfill this covenant, and that a court of " equity would not have compelled them to perform it " under an idea that, as they bought with notice, good " conscience required that they should fulfil this cove- " nant, though under no legal obligation to do so."

" I say that they would not be under any legal obli- " gation to fulfil such a covenant, for the simple reason " that it is not a covenant real running with the land. " The leading case on covenants running with the land " is Spencer's Case, 5 Rep., 16 (1 Smith's Lead, Cas. " 115). But this case throws comparatively little light " upon the question we are considering, for it was a " case arising under a lease between landlord and " tenant. It was a lease of a house and certain lands " by deed for twenty-one years, and by the lease the " lessee covenanted for himself and his assigns that he " would build a brick wall on a part of the leased land. " The lessee assigned his term to another. The ques- " tion involved was whether the assignee of this lease " was bound to build this brick wall and could be sued " by the landlord in an action of covenant, if he refused " so to do. The Court decided that he was bound to

" build the wall, and that this was a covenant real run-
" ning with the land, and that he might, therefore, be
" sued upon it by the landlord. This decision was
" based upon the ground that the wall to be built
" was on the leased premises, and that the lessee had
" expressly bound himself and his assigns. The con-
" trary conclusion would have been reached had either
" the lessee bound himself only and not himself and
" his assigns, or had the wall to be built elsewhere
" than on the leased premises, for the assignee, though
" named in the covenant, is not bound by a covenant
" to do something which is merely collateral and which
" in no manner touches or concerns the land demised
" and assigned to him But it was held that if instead
" of an obligation to build in the future a brick wall, a
" thing not then in being, the covenant had extended
" to a thing *in esse* parcel of the land demised, such
" covenant would go with the land and bind the assignee
" of the land, though the covenant in its words only
" bound the covenantor or lessee, and was not by ex-
" press words extended to the assigns of the lessee.
" These distinctions have ever since been followed as
" law. See Mayor of Congleton vs. Pattison, 10 East,
" 130; Keppell vs. Bailey, 2 Myl. & K., 517; Hurd vs.
" Curtis, 19 Pick., 459."

The case of Brewer vs. Marshall and others, 3 C. E. Green (N. J.), 337, is also in point. The facts in this case were as follows: The defendant Cheeseman was, in 1841, seized of a farm in the County of Gloucester, on which were valuable beds of marl. On the 23d of February in that year he conveyed to James W. Lamb two tracts of the farm, one a tract of forty-eight acres lying east of the Cross Keys road, which divides the farm, and another of twelve and one-half acres, lying west of the road, and which in the deed is described as " twelve acres and a half of marl land." The deed grants the right of way over a strip twenty feet in width from the road to the creek, along the marl lot, and contains in the description of the premises after the de-

scription of the way, these words: "Also, the said George Cheeseman, his heirs or assigns, are not to sell any marl by the rood or quantity from off his premises adjoining the above property." On the 14th of December Lamb conveyed back to Cheeseman the forty-eight acre lot. On the 3d of January Cheeseman conveyed to Lamb another part of the original farm in two lots. One was a lot of seven acres adjoining the creek, and north of and adjoining the twelve and a half acre lot; the other was a strip of one acre leading from the seven acre lot eastwardly to the road, and including the land over which the right of way had been granted. On the same day Cheeseman executed to Lamb a bond in the penalty of $5,000, secured by a mortgage on a part of the farm not conveyed. The conditions of the bond and mortgage (which were both in the same words) contained this recital: That Cheeseman, in consideration of $1,650, had, by deed of the same date, conveyed to Lamb a lot of seven acres, part of the original farm; that the principal value of said lot consisted in the bed of marl upon it; that there were divers beds of marl upon the residue of the farm; that said sum was paid not only as the consideration for said lot, but upon the express agreement between the parties that neither Cheeseman, his heirs or assigns, nor any other person holding said farm, should, within thirty years from the date, dig, sell, remove, or suffer to be dug, sold or removed from off the said farm any part or parcel of the marl thereon, except for the use of the farm, "so that the said marl or any part thereof should not be sold or otherwise brought into competition with the marl of said James W. Lamb;" and upon the further agreement that, for any violation of said

covenant by the said Cheeseman, his heirs, executors, administrators or assigns, or other persons holding said farm under him or them, said Chesseman, his heirs, executors, or administrators, should pay to said Lamb, his heirs, executors, administrators or assigns the sum of $500. The condition was that if they did not so dig or sell, and if they paid up such penalties, the obligation and mortgage should be void. Subsequently Lamb conveyed the twelve and a half acre lot to the complainant, Brewer; and also Cheeseman, by deeds made at different times, conveyed to the defendant Marshall the rest of the farm not conveyed to Brewer. The defendants at different times dug, removed and sold from the seven-acre tract, and other parts of the farm, marl by the ton and measured quantity since 1842. Thereupon the complainant, Brewer, brought a suit asking for an injunction, and insisting that the clause in the deed of 1841 and the agreement recited in the bond and mortgage, above set forth, from Cheeseman to Lamb, were real covenants running with the land, and that he as the assignee of Lamb and the owner of the lands conveyed to him was entitled to the benefit of those covenants, and that Marshall, as the assignee of the land to which they related, held the land subject to the burden of those covenants, and was bound to observe them. Upon this subject the CHANCELLOR, at page 340, thus speaks:

"Upon the correctness of these positions the whole "question of the injunction depends. If the covenants "do not run with the land conveyed to Brewer, he, as "assignee, cannot have the advantage of them; and if "the burthen of them does not run with the land con-"veyed to Marshall, he is not bound by them. In "either case the injunction against Marshall ought not "to be retained. There has been much discussion in

" the Courts as to what covenants or agreements are " real coveants and run with the land, so that the as- " signee or heir of the land can take advantage of them, " and as to what covenants run with the land burthened " by them, so that the assignee or heir takes the land " subject to the burthen.

" Both of the covenants in this case are valid " as personal covenants; Lamb could maintain a suit " against Cheeseman for their violation, and could " recover his damages. For the purpose of this " motion we may admit that the mortgage is valid as " against Marshall ; he took title subject to it, and his " lands are liable in case of forfeiture or breach of con- " dition. But the injunction does not depend upon " that question ; for such damage Brewer, as assignee, " must look to a foreclosure and sale. The injunction " can only be maintained on the ground that the " agreement in the recital is a covenant real running " with the land. * * * To charge land with the " burthen of a covenant, there must be some privity of " estate between the covenantee and the assignee of " the land so burthened, or he will not be charged with " the covenant. This was so laid down by the Court " in delivering their opinion in Bally vs. Wells, 3 " Wilson, 29. 'There must be always a privity be- " tween the plaintiff and defendant to make the de- " fendant liable to an article of covenant.' The reason- " ing of Lord Brougham, in Keppell vs. Bailey, in 2 " Mylne & K., 517, is founded upon and illustrates " this principle. The decision of the Supreme Court " of Massachusetts, in Hurd vs. Curtis, 19 Pick., 462, is " expressly placed upon the ground that there is no " privity of estate between the plaintiff and defendant. " The covenant was between the owners of mills on the " same stream as to the use of the water in their re- " spective mills ; it was drawn to bind their assigns. " The defendant was assignee of the mill of one of the " covenantors. It was held that he was not bound, as " there was no privity of estate between him and the " plaintiff (see also Plymouth vs. Carver, 16 Pick., " 183).

" In the case before me, it is clear that there is no " privity of contract or of estate between Brewer and " Marshall. And if such privity is necessary to that " object, Marshall is not bound by the covenant."

This ruling was affirmed in the Court of Errors and Appeals, in 4 C. E. Green, N. J., 557. The Chief Justice, in passing upon the question of the enforcement of the contract, says, at page 546:

"If we enforce the covenant now under consideration, "I do not know on what theory we could refuse to ex- "ecute any covenant which has for its purpose any "conceivable restriction placed upon the free enjoy- "ment of land. I cannot think it proper to go this "length.

In the case of Glenn and others, executors, vs. Canby, 24 Maryland, 127, we have a case where A borrowed money to be expended in erecting houses upon certain land and executed to B a mortgage on the land, by which he covenanted for himself, his representatives and assigns, to pay the mortgage debt, and it was expressly declared in the mortgage that this, with certain other covenants, should run with the land. An action was brought upon this covenant against an assignee of the mortgagor, and the Court, at page 130, considering the question, says:

"The demurrer in this case presents the question "whether the covenant of a mortgagor for himself, his "representatives and assigns, to pay a mortgage debt, "binds the assignee of the mortgaged property, or, in "other words, whether by force of the term 'assigns,' "such a covenant runs with the land.

"The mortgage exhibited here shows that the debt "secured was a loan made to enable the mortgagor to "improve the property described in the mortgage. *It "also contains a clause declaring that the covenant to "pay the old debt, with others relating to interest and "taxes, should run with the land;* and it was insisted "on these grounds that the covenant in question "should be held to bind the appellee to whom the "property was subsequently assigned by the mortgagor. "We have concluded, however, that these considera- "tions have no bearing on the point to be decided.

" The legal operation and effect of the covenant in that " particular must be determined by its subject matter, " and not by the terms in which it is expressed. The " established doctrine is that a covenant, to run with " the land, must extend to the land so that the thing " required to be done will affect the quality, value or " mode of enjoying the estate conveyed, and thus con- " stitute a condition annexed or appurtenant to it. " There must also be a privity of estate between the " contracting parties and the covenant must be con- " sistent with the estate to which it adheres, and of " such a character that the estate will not be defeated " or changed by a performance of it. If, however, " on the other hand, the covenant does not extend to " nor affect the quality, value or mode of enjoying the " land conveyed, and is merely collateral to it, or of " such a character that a performance of it will defeat " the estate of the party claiming the performance, " then it does not run with the land, or bind the as- " signee of the covennator, though he be expressly in- " cluded by the General Term ' assigns.' Spencer vs. " Clark,1 Smith's Lead. Ca., 115, 2 Sug. on Vend., 178. " Platt on Cov., 3 Law Lib., 205, 215, 3 Term, R., 393, " 8 East, 487, 10 East, 130. Tested by these princi- " ples, this is clearly a personal and not a real cove- " nant."

The other cases cited will be found to go to the same point also, and fully support the proposition that the agreement sued on in this case, notwithstanding it is sought to be charged as a lien upon the premises, is a mere personal obligation of the two contracting companies.

(b) *The contract of November 18th, 1879, in terms only bound The Des Moines Northwestern Railway Company to deliver its freight and passengers to the appellant at Waukee. There is no allegation that that company did not fully and faithfully perform this obligation.*

It will be observed that the contract in no way ex-

presses any obligation on the part of the Des Moines and Northwestern not to lease its line of railway, nor does the contract in terms assume to bind the assigns of that railway company, nor does it agree with the appellant that its lessees will deliver all the freight and passengers hauled by them to the appellant. If the appellant wanted to bind the Des Moines Northwestern Railway Company to such an obligation as that it should have so expressed it in the contract. It is not so expressed and the appellant cannot now ask the Court to make a new contract for it in this regard. To allow the claim for damages as asked would be for the Court to import into this contract the covenant on the part of the Des Moines Northwestern Railway not to lease or otherwise dispose of its line of railway without providing by suitable covenants that its lessee or purchaser or assign would duly observe and perform all the obligations of this contract. Such a provision might have been inserted, but it is sufficient to say it was not. (Transportation Co. vs. Pipe Line Co. *supra*). It therefore follows that the appellant had no claim for damages against either the Des Moines Northwestern Railway Company or the Wabash, St. Louis and Pacific Railway Company.

(c) *The agreement of the Wabash, St. Louis and Pacific Railway Company was not an absolute engagement to carry out this contract. It agreed either to do so or to save the other party harmless therefrom.*

It is evident that upon Article IX. of the lease given by the Des Moines Northwestern Railway Company to the Wabash, St. Louis and Pacific Railway Company,

the latter company is not bound as having absolutely agreed to carry out the provisions of this contract. It only bound itself to the alternative to either do this or to save the other party harmless in case it did not do so.

In the latter alternative its agreement to indemnify is a mere personal undertaking. If it could be enforced by the appellant as against the Wabash, St. Louis and Pacific Railway Company upon the ground that it was a contract made for appellant's benefit, then it must be in a suitable action at law. It could not give the appellant any standing in a court of equity upon the intervening petition filed by it in this case.

WAGER SWAYNE,
Solicitor for W., St. L. & P. Ry. Co.

WM. RUSH TAGGART,
Of Counsel.

Mar. 25, '90.—50.

FILED
JAN. 24 1890

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1889.

THE DES MOINES & FORT DODGE RAILROAD COMPANY,
Appellant,

vs.

THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, ET AL.,

No. 256.

STATEMENT AND BRIEF ON BEHALF OF APPELLEES.

WELLS H. BLODGETT,
Solicitor for Humphreys and Tutt, Receivers.

Nixon-Jones Printing Co., 212 Pine St., St. Louis, Mo.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

THE DES MOINES & FORT DODGE RAILROAD COMPANY,
Appellant,

vs.

THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, ET AL.,

STATEMENT OF THE CASE.

The record in this case discloses the following facts:—

First. On the 12th day of June, 1879 (Record, pages 40 to 46), a railroad company known as the "Des Moines,

Adel & Western Railroad Company," was organized under the laws of Iowa. Its articles of incorporation contained, among other things, the following, with respect to the line of railroad which it was organized to construct, to-wit:—

"The main line of said road shall extend from the City of Des Moines, in Polk County, Iowa, westwardly through the counties of Dallas and Guthrie in said State to the Missouri River."

The road which said Des Moines, Adel & Western Railroad Company was authorized to construct is indicated by a red line upon the accompanying map.

Second. On the 18th day of November, 1879, the Des Moines & Fort Dodge Railroad Company was the owner of a line of railroad extending from Des Moines in a northwesterly direction by the way of Waukee to Fort Dodge, in the State of Iowa. The road of the last named company is indicated by a yellow line on the accompanying map.

Third. The Des Moines, Adel & Western Railroad Company being incorporated to construct a line from Des Moines by the way of Waukee in a westerly direction to the Missouri River, and the Des Moines & Fort Dodge Railroad Company already having a line extending from Des Moines by the way of Waukee to Fort Dodge, the two companies on the 18th day of November, 1879, entered into a contract (Record, page 10), by which the Des Moines, Adel & Western Railroad Company, for certain considerations therein named, agreed to deliver to the cars of the Des Moines & Fort Dodge Railroad Company at Waukee, all its freight and passengers bound to Des Moines, or to any place through Des Moines and beyond, for a period of twenty years. The last clause of that contract is as follows:

"This contract, and any damages for the breach of the same, shall be a continuing lien upon the roads of the two contracting companies, their equipment and income, in whosesoever hands they may come, the lien of the Adel road being limited to so much thereof as lies between Waukee and Panora."

Fourth. The name of the Des Moines, Adel & Western Railroad Company was afterwards changed to the "Des Moines Northwestern Railway Company."

Fifth. On or about the 8th day of December, 1880, the Des Moines Northwestern Railway Company (formerly the Des Moines, Adel & Western Railroad Company), entered into a contract (page 13, of Record) with the Narrow Gauge Construction Company and the Wabash, St. Louis & Pacific Railway Company under which the Construction Company built for the Des Moines, Northwestern Railway Company its line from Waukee into the City of Des Moines.

Sixth. On the 28th day of November, 1881, the Des Moines Northwestern Railway Company conveyed (page 25 of Record) its railroad then extending from Des Moines in a northwesterly direction by way of Waukee to Fonda, to the Central Trust Company of New York and James Cheney, trustees, to secure the "General Mortgage Bonds" of the Wabash, St. Louis & Pacific Railway Company to the extent to which said bonds had been issued or should be issued and sold for the construction of said Des Moines Northwestern Railroad.

Seventh. On or about the 28th day of February, 1881, the Des Moines Northwestern Railroad Company leased its

railroad extending from Des Moines by the way of Waukee to Fonda (page 19 of Record), to the Wabash, St. Louis & Pacific Railway Company for a term of ninety-nine years. The ninth clause of said lease is as follows: —

"The party of the second part (the Wabash Company) takes this lease subject to the contract existing between the party of the first part (the Des Moines Northwestern Railway Company), and the Des Moines and Fort Dodge Railroad Company, and agrees to carry out the same, or to save the party of the first part harmless therefrom."

Eighth. After the Wabash, St. Louis & Pacific Railway Company became lessee of the Des Moines Northwestern Railway it failed to comply with that clause of the contract made between the Des Moines Northwestern Railway Company and the Des Moines & Fort Dodge Railroad Company, by which the Des Moines Northwestern Railway Company undertook to deliver to the cars of the Fort Dodge Company all its freight and passengers bound to Des Moines, or to any place through Des Moines and beyond, for a period of twenty years; and instead of delivering its freight and passengers to the Des Moines & Fort Dodge Company to be transported by it from Waukee to Des Moines, as provided in the contract, the Wabash Company transported its freight and passengers from Waukee into Des Moines over the line which the Des Moines Northwestern Railway Company had constructed between said points, and of which the Wabash Company was then the lessee. To recover damages for that breach of the agreement this intervening petition was filed in the Wabash foreclosure case, the contention being, that under the last clause of the contract of Nov. 18th, 1879, any claim for damages which intervenor might have, was a lien on a portion of the property in the hands of the receivers.

THE INTERVENING PETITION.

The petition states that the defendants, Solon Humphreys and Thomas E. Tutt, had been appointed receivers, and had charge of the property in controversy; charged that the contract in question had been violated in the manner above set forth, and prayed that a reference be made to a master to take evidence and report to the Court the amount due petitioner (the Des Moines & Fort Dodge Railroad Company) as damages, and that said sum be declared a first lien on the Des Moines Northwestern Railroad from Waukee, in Dallas County, to Panora, in Guthrie County, and the equipment and income thereof, and that the receivers be required to pay said sum out of any rents, income or earnings coming into their hands, before any other claims; that said railroad be sold for the payment of said claim, and for other proper relief.

DEMURRER.

The receivers filed a demurrer (page 35 of Record), in which they assigned the following objections to the petition: —

1st. That the contract sued on was against public policy.

2d. That the contract was in violation of the statutes of Iowa.

3d. That the contract was *ultra vires*.

4th. For an additional ground of demurrer they stated (page 38 of Record) that the contract sued on did not create a lien upon the property of the Des Moines Northwestern Railway Company, or bind the Wabash, St. Louis and Pacific Railway Company, or its receivers.

DEMURRER SUSTAINED.

The cause coming on to be heard (p. 47 of Record), upon the demurrers of the receivers, and of the Des Moines Northwestern Co., the demurrers were sustained and the petitioner electing not to amend, or plead further, it was ordered and adjudged that the petition be dismissed with costs, and final judgment was rendered for the defendants, from which judgment the intervenor appealed to this court.

POINTS.

I.

The contract on which the petition is based was against public policy and void.

II.

The demurrer was properly sustained, because the petition does not state facts sufficient to entitle intervenor to any relief. It does not show that there has been any violation of the contract; it does not state that the Des Moines Northwestern Company failed to deliver all of its freight to intervenor.

III.

The demurrer was properly sustained as to the Wabash Company and the receivers, because the covenant in the contract by which the Des Moines Northwestern Railway Company agreed to deliver to intervenor at Waukee, for

twenty years, all its freight and passengers, did not bind them. It was a mere personal covenant that did not run with the property, or bind the Wabash Company as a lessee thereof.

IV.

The intervening petition was properly dismissed, because the clause in the agreement to the effect that said contract and any damages for a breach thereof, should be a continuing lien upon the roads of the contracting parties, was ineffectual and wholly failed to pass an estate or create a lien on the railroad.

V.

The clause in the lease of the Des Moines Northwestern Company to the Wabash Company, wihch states that the Wabash Company took the lease subject to the contract of the Des Moines Northwestern Company with the Fort Dodge Company and was to perform the same, or save the Des Moines Northwestern harmless therefrom, was only an indemnity contract to which the plaintiff was not a party and for a breach of which it cannot sue.

VI.

Unless the last clause of the contract of November 18th, 1879, between intervenor and the Des Moines Northwestern Company, was sufficient to give intervenor a lien on the Des Moines Northwestern Railroad, then the petition was properly dismissed, because it is only those who have specific liens on the property or funds in Court who can intervene in foreclosure suits.

BRIEF.

The contract on which the intervening petition is based was against public policy and void.

The record shows that the Des Moines Northwestern Railway Company was incorporated for the very purpose of constructing and operating a railroad for public use between Des Moines and Waukee, and the contract it entered into with the Des Moines & Fort Dodge Company, by which it agreed to deliver to the latter all its passengers and freight destined to Des Moines and beyond for a period of twenty years, was in effect an agreement not to construct its own line and discharge its own duties to the public as a common carrier between those points.

It is true that the contract did not in terms prohibit the construction of the road, but that fact does not alter the effect of the agreement, or render it any less objectionable. From a legal stand-point the case made is precisely as it would have been if the Des Moines Northwestern Company had, on the date of the contract, possessed a completed line from Waukee to Des Moines, and had contracted to tie it up and not use it for the period mentioned. In other words, the contract did not *prohibit the construction of the line*, but it prohibited the Des Moines Northwestern Co. from using its line for twenty years, in case it should be constructed, as provided in its charter. It is not pretended that there was any statutory authority for the contract, and without there was such authority the contract will not be enforced in a court of equity.

It has been repeatedly said, that where corporations

are granted the right to construct a line of railroad for public use, they assume, as a consideration for the grant, certain obligations to the public which they cannot assign or surrender without authority, and it is also held that when a corporation has once constructed a line of railroad for public use, in the transportation of persons and property, it cannot lawfully agree that it will not perform the duties devolving upon it as a common carrier.

Thomas v. *Railroad Company* (101 U. S. 71) was a case in which a railroad company had in 1864, leased all its property to certain individuals for a term of twenty years, upon condition however that the company might at any time elect to terminate the contract and re-enter upon the premises, and that if it elected to re-enter it should pay to the lessees such damages as an arbitration might award. The railroad company in 1867, elected to terminate the lease, and an arbitration was had in which the lessees were awarded the sum of $159,437.07 as damages. The case reached this Court where it was, among other things, contended by the railroad company, that its lease to Thomas and his associates, by which it had divested itself of the power to discharge its public duties, was against public policy and void. In passing upon the question this Court then said:

"There is another principle of equal importance and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires* as we have just discussed, shows very clearly that the railroad company was without the power to make such a contract.

"That principle is that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due

performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy. This doctrine is asserted with remarkable clearness in the opinion of this court, delivered by Mr. Justice Campbell, in *The York & Maryland Line Railroad Co.* v. *Winans*, 17 How. 30. The corporation in that case was chartered to build and maintain a railroad in Pennsylvania by the legislature of that State. The stock in it was taken by a Maryland corporation, called the Baltimore and Susquehanna Railroad Company, and the entire management of the road was committed to the Maryland company, which appointed all the officers and agents upon it, and furnished the rolling stock. In reference to this state of things and its effect upon the liability of the Pennsylvania corporation for infringing a patent of the defendant in error, Winans, this court said: 'This conclusion (argument) implies that the duties imposed upon the plaintiff by the charter are fulfilled by the construction of the road, and that by alienating its right to use, and its power of control and supervision it may avoid further responsibility. But those acts involve an overturn of the relations which the charter has arranged between the corporation and the community. Important franchises were conferred upon the corporation to enable it to provide facilities for communication and intercourse, required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided as remuneration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations without the consent of the legislature.' "

The Peoria & Rock Island Railway Company v. *The Coal Valley Mining Co.* (68 Illinois, 489) was a case in

which the Court fully discussed the power of railroad companies to enter into contracts absolving themselves from the performance of their charter obligations. In that case one railroad company had undertaken through an agreement with another, to limit the amount of coal which it should transport for the public, and an injunction was asked to restrain one of the contracting companies from carrying coal except on the terms provided in the agreement. In determining the case the Court said:

"Have not the public such an interest in the use and continued operation of the railroads of the State as should prevent a Court of Equity from enforcing a contract forbidding a railroad from carrying passengers or freight? Or where, by the agreement such a sum is required to be paid for track service, or tolls, as to unreasonably burthen the carriage of persons or property? Or should the chancellor leave the parties to seek a remedy, if they have any, by an action at law?

"To determine more accurately the validity or invalidity of the conditions of the agreement in this case, it may be well to consider somewhat the objects that were intended to be accomplished by granting charters to these bodies. The consideration operating on the General Assembly and the people through their representatives were twofold. The first and most important was the accommodation of the public and the promotion of their interests. The other was the advancement of the interests of private individuals who should become stockholders in such companies. No one will question the fact that the primary object of the people in bringing these vast and useful agencies into being, was to afford facilities for travel and commerce by speedy, convenient and cheap transportation of merchandise, the products and minerals of the various sections of the country to the best markets, and thus to supply every portion of the country with the products of the other parts of our extended territory. They were needed,

and were well adapted to ready and rapid exchange of commodities and the immediate development of the resources of the country, and have from an early period after their first introduction to use been known and recognized as the greatest of all the means employed by our civilization in advancing the trade and facilitating inter-communication in our country, and they have fulfilled the expectations of the people in this regard."

* * * * * * * * * * *

"These being the inducements which led to the formation of these bodies, their charters granted privileges and imposed duties on them. By their characters they are empowered, besides building and maintaining their roads, to carry passengers and property for a compensation: and at the same time a correlative duty is imposed, that they shall receive and carry passengers and freight over their roads, as they may be offered for the purpose. And when they accept their charters, it is with the implied understanding that they will fairly perform these duties to the public, as common carriers of both persons and property, under the responsibility which that relation imposes. And this is a duty they cannot escape by neglect, refusal or by agreement with other persons or corporations that they will disregard or refuse to perform them. These are duties they owe the public, and it was in consideration that they would be performed that their charters were granted. They have no power to absolve themselves from performing these charter obligations, and any effort to do so by contract or otherwise is void.

"Whilst railroads must be protected in all of their rights with the same exactness that individuals are, they must at the same time be held to a rigid performance of their duties to the public.

"All the roads that are parties to this litigation are common carriers, and owe the duty as such, to the public, of transporting passengers and property when required to perform these duties, and coal is a kind of property suitable and proper to be carried over their several roads, and it must be carried as they do other freight, for all persons who

bring it to their roads for the purpose, on the same terms as they do other like freights similar in bulk and in weight; and as common carriers, it is their duty to provide all reasonable facilities for its transportation. And if these bodies have, by contract, bound themselves not to perform these duties, such contracts are *ultra vires* so far as it concerns the public."

Mr. Morawetz in his work on private corporations (Sec. 495) states the rule, as follows:—

"It has been held that a railroad company is unable by reason of its duties to the public to make a binding contract with a rival company not to extend the line of its road beyond a given point. Thus in Hartford and New Haven Railroad Company *v.* New York and New Haven Railroad Company (3 Robarts 411, 415), Monell, J., delivering the opinion of the Court, said: 'The completion of the New Haven and Northampton Railroad to Northampton would open a new line of travel southward, and would be a competitor and rival of the road of the plaintiffs. Such competition and rivalry it was not lawful for these parties to prevent, or attempt to prevent, and any contract to affectuate such a purpose is void. Public policy is opposed to any infringement of the rights of travel, or of any of the facilities which competition may furnish, and the law will not uphold any agreement which does or may injuriously affect such rights or facilities.'"

There are a great variety of cases in which the same principle has been applied, and the universal rule seems to be that all contracts by which public, or *quasi*-public corporations attempt, for the purpose of private gain, to absolve themselves from a full performance of their public duties are against public policy and void.

State v. *Hartford & N. H. R. R. Co.*, 29 Conn. 538:
Fuller v. *Dame*, 18th Pick. 472:
Marsh v. *The Fairbury P.& N. W. R. R. Co.*, 64 Ill. 414.

This is a case in which a railroad company was chartered to construct and operate a railroad for public use between Waukee and Des Moines, and the record shows that in disregard of its charter obligations it entered into an agreement to deliver to a competing company at Waukee, for twenty years, all its freight and passengers destined to Des Moines. Afterwards, in violation of its private contract, but in discharge of its charter obligations, it constructed and used its own line between the points in question, and this action is brought to recover damages for that breach of the private contract; or, in other words, it is an action brought against a corporation for constructing and using the railroad authorized by its charter. Our contention is, that the agreement of the Des Moines Northwestern Railway Company not to build and use its own road, or enter the field of competition as a common carrier between Waukee and Des Moines, for twenty years, was unlawful, and if we are correct in this, then the intervening petition was properly dismissed by the Court below.

II.

The demurrer was properly sustained, because the petition does not state facts sufficient to entitle intervenor to any relief. It does not show that there has been any violation of the contract; it does not state that the Des Moines Northwestern Company failed to deliver all of its freight to intervenor.

The material allegations of the petition are substantially as follows:—

First. That on November 18, 1879, the Des Moines Northwestern Company contracted to deliver *all its freight and passengers*, bound to Des Moines, to the Fort Dodge Company at Waukee for twenty years.

Second. That on the 28th day of February, 1881, the

Des Moines Northwestern Company leased its entire road to the Wabash, St. Louis & Pacific Railway Company ; and

Third. That after the lease was made the Wabash, St. Louis & Pacific Railway Company, as lessee, and Humphreys and Tutt, as receivers, carried *all their freight and passengers* from Waukee to Des Moines over their own road.

It is not charged or contended that the contract was violated while the Des Moines Northwestern Company operated its own road and had freight and passengers to deliver. The specific charge is, that on February 28, 1881, the Des Moines Northwestern Company leased its road to the Wabash Company, and that after that date the Wabash Company and its receivers failed and refused to deliver *their* freight and passengers to intervenor. In other words a failure on the part of *the Wabash Company and its receivers* to deliver *their freight and passengers* to the Fort Dodge Company, is charged as a breach of the contract made by the Des Moines Northwestern Company, when it is not alleged or shown that the Des Moines Northwestern Company contracted for its assigns, or contracted not to assign, or lease its property, or did more than agree to deliver or cause to be delivered to the Fort Dodge Company such freight and passengers as it might bring to Waukee *while it should control and operate its own road.*

If a party was to enter into a contract, to the effect that he would deliver to a certain railroad company all the coal *he* should mine from a given tract of land within a given time, that would be one thing ; but if the same party should agree to deliver to the railroad company *all the coal mined by anybody* from the same tract within the period named, that would be another thing, and the duties of the contracting party under the two agreements would be entirely different.

If the petition in this case charged that in November, 1879, the Des Moines Northwestern Company agreed to deliver, or caused to be delivered to intervenor at Waukee, for twenty years, all freight and passengers brought to Waukee over the Des Moines Northwestern Railroad *by any person or corporation*, and that since the making of the lease certain freight and passengers brought over said road to Waukee by the Wabash Company had not been delivered to intervenor, a totally different case would be stated. But as the petition reads, no breach is charged, unless the averment "that the Des Moines Northwestern Company agreed to deliver *all its* freight and passengers to the Fort Dodge Company," is read and understood as being equivalent to an averment that the Des Moines Northwestern Company agreed to deliver to the Fort Dodge Company for twenty years all the freight and passengers brought to Waukee *by any person or corporation over the Des Moines Northwestern Railroad*.

If the Des Moines Northwestern Company had agreed to deliver to plaintiff *all the freight and passengers brought by any company or corporation to Waukee over the Des Moines Northwestern Railroad*, for twenty years, then the petition would state a breach of that agreement, because such a covenant would remain in force and would be binding upon the Des Moines Northwestern Company, regardless of who might operate its road and bring the freight and passengers to Waukee.

But on the other hand, if the Des Moines Northwestern Company only contracted to deliver *all its freight and passengers* to the Fort Dodge Company at Waukee — or in other words, if it only agreed to deliver to the Fort Dodge Company such freight and passengers as *it might bring to Waukee over its road*, then the petition does not state a

breach of the agreement, because when the Des Moines Northwestern Company ceased to operate its road, it ceased to have freight and passengers to deliver.

We do not think we are too technical when we insist, that if the Des Moines & Fort Dodge Railroad Company desired to secure for a period of twenty years all the freight brought to Waukee *over the road of the Des Moines Northwestern Company by any one* it should have protected itself by a covenant to that effect in the contract. But only having bargained for such freight and passengers as might be brought to Waukee by the Des Moines Northwestern Company, and the Des Moines Northwestern Company only having covenanted *for itself* and for the delivery of *its own freight* and passengers, and having made no covenants against an alienation of its property, it seems clear that the leasing of its road to the Wabash Company and the subsequent failure of the Wabash Company and its receivers to deliver their freight and passengers to intervenor, did not constitute a breach of the agreement sued on.

Our contention is, that the court ought not to import into the contract, or ingraft upon it, an additional covenant obligating the Des Moines Northwestern Company to retain and operate its road for twenty years. Courts cannot make contracts for parties, and they ought not to supply material ingredients which the parties have omitted, and which cannot be properly considered as having been in their minds.

The following illustrates, in some degree, the rule which we think should be applied in construing this contract.

The case of *Hudson Canal Company* v. *Pennsylvania Coal Co.* (8th Wall, 276), was one in which a coal com-

pany was engaged in mining coal, for which it wished to get easy transportation to New York City, and the Canal Company at the same time owned a canal which would afford the desired transportation, provided a railroad could be constructed to connect the canal with the coal lands. Under these circumstances the two companies entered into a written contract under their corporate seals, reciting the situation and needs of the respective parties, and among other things, that the capacity of the canal should be enlarged, and that it would furnish at all times thereafter, to the boats of the Coal Company, all the facilities of navigation afforded by the canal to the boats used by others, and for which it would charge a reduced rate of toll for 400,000 tons of coal per annum, said tolls to be regulated each year by the market value of coal. And the Coal Company in consideration of the premises and of the acts done and *investments made with a view to the transportation of coal on the canal of said Canal Company*, as well as of the mutual undertakings in said contract contained, and of the sum of one dollar, promised and agreed with the Canal Company to use its influence to cause a speedy construction of the railroad connecting the canal with the coal lands.

Under that agreement the Coal Company constructed the railroad and the Canal Company enlarged its canal so as to make its capacity sufficient for the transportation of all the coal which the Coal Company could mine, and the Coal Company put on boats for which the Canal Company charged only the reduced rates of toll. Matters went on in that way for some time, when the New York and Erie Railroad Company, whose road led to New York, constructed a branch road to connect with the road of the Coal Company at the point where the latter connected with the canal, and the Coal Company began sending its coal to New York over the Erie road.

The Canal Company thereupon brought suit on the contract, contending that under a true construction of the agreement there was imposed upon the Coal Company, in consideration of the obligations of the Canal Company, a correlative obligation on the Coal Company to send its coal by the canal alone, and that the obligation of the Coal Company *was so plainly to be perceived in the contract that the Court would enforce it as an implied covenant*, as fully as though it was expressed in words.

The declaration, among other things, stated that relying upon the covenants of the Coal Company, the Canal Company immediately entered upon the work of enlarging their canal and continued said work with diligence and at great expense until the same was completed; that the canal as enlarged would permit the transit of boats bearing one hundred and twenty-five tons, when at the date of said contract said canal would not permit the transit of boats bearing more than fifty tons; that defendant claiming the benefits and privileges of the contract did, after the completion of said railroad, procure a large number of boats to be used in the transportation of coal upon the canal of the plaintiff, as contemplated by said agreement. *That defendants, not regarding their covenants and undertakings to transport all their coal upon the canal of plaintiffs*, at the prescribed rate of toll, did not, nor would not perform that covenant, etc., for which the Canal Company claimed damages in the sum of nine hundred thousand dollars.

In deciding the case the Court said:—

"Obviously the decision of the question must depend upon the construction to be given to the first agreement therein set forth, as it is quite clear that the declaration is well drawn if that agreement, when properly construed,

will support the allegations that the defendants covenanted and agreed that all the coal mined on their coal land, and transported over their railroad to the place where the railroad connects with the canal of the plaintiffs, should be sent forward from that place to tide-waters upon their canal, and that the defendants also covenanted and agreed that they would pay to the plaintiffs the rate of toll therein prescribed for the use of the canal in such transportation.

Provision is made by the agreement, it is admitted, that the rates of toll to be charged by the plaintiffs shall be permanently reduced, and the plaintiffs contend that the defendants, in consideration of that stipulation, assumed a correlative obligation to send all their coal brought over their railroad to market upon the plaintiffs' canal. Express covenant to that effect, it is conceded, is not to be found in the articles of agreement, but the plaintiffs contend that the obligation in that respect is so plainly contemplated by the agreement that the law will enforce it as an implied covenant as fully as if it were expressed in appropriate words.

* * * * * * * * * * *

Examined in the light of the rules here suggested, the Court is of the opinion that the articles of agreement set forth in the declaration contain no such covenants as those alleged by the plaintiffs as the foundation of their claim; that the terms of the agreement do not support the allegation that the defendants ever made any such covenants, nor that they ever agreed to pay toll except for coal actually transported under the agreement. Language to express any such contract is entirely wanting in the instrument, nor is there any covenant on the part of the plaintiffs from which any such implication can legally arise."

The agreement in this case was elaborately prepared and the undertakings of each of the contracting parties were stated in separate paragraphs, but the contract contains only one covenant on the part of the Des Moines Northwestern Company. That is found in the twelfth section and is as follows: —

"Twelfth. In consideration of the foregoing the Adel road (the Des Moines Northwestern) hereby agrees to deliver to the cars of the Des Moines road (the Des Moines & Fort Dodge) at Waukee, all its freight and passengers bound to Des Moines, or to any place through Des Moines and beyond, for the period of twenty years from this date."

Of course we understand that in construing the agreement the court ought to endeavor to ascertain from the whole instrument the real intentions of the parties, but at the same time we insist that *the intention of the parties must be gathered from the words they actually employed.* If the Des Moines Northwestern Company only made one covenant, or in other words, if it only covenanted to do one thing, to wit, "*deliver its own freight and passengers to the Fort Dodge Company at Waukee*, then we contend that the court *ought not to supply* a covenant on the part of the Des Moines Northwestern Company against the alienation of its property, or a covenant to the effect, that in case it should lease, or sell its road, it would be personally responsible to the Fort Dodge Company for any failure on the part of its grantees, or lessees, to deliver their freight and passengers to intervenor. Our protest is against adding to the covenants *found in the agreement* others which *are not found* for the sole purpose of protecting and providing for a party, who in making his contract, did not protect and provide for himself.

If we are right in our construction and if, as we contend, the contract only bound the Des Moines Northwestern Company to deliver its own freight and passengers to the Fort Dodge Company, and if its duty to deliver freight and passengers ceased with its control of the road, then it is clear to a demonstration that the petition charges no breach

of the agreement, because as we have before shown, the petition charges no failure prior to the date of the lease.

III.

The demurrer was properly sustained as to the Wabash Company and the receivers, because the covenant in the contract by which the Des Moines Northwestern Railway Company agreed to deliver to intervenor at Waukee, for twenty years, all its freight and passengers, did not bind them. It was a mere personal covenant that did not run with the property, or bind the Wabash Company as a lessee thereof.

Two parties cannot ordinarily create a legal right of action against a third, and the only exception to that rule is where a contract is of such a nature as to bind an estate so that an assignee or grantee thereof becomes responsible by reason of his receiving the estate charged with the covenant. Or in other words, in order to render an assignee, or other third party, liable, the covenants must be such as relate to the premises in such manner that the burden of them is imposed by law on each subsequent taker of the estate.

Covenants that run with lands are always annexed to grants, and they must relate to something to be done on the lands granted. Therefore if in a given case there is no grant of an estate, there can be no covenants which bind the estate, or property of the promisor in the hands of his lessee, or grantee. Although one may covenant for himself and his assigns, yet if the thing to be done is collateral to land and does not touch or concern the property granted or demised, then an assignee of the covenantor cannot be charged upon the covenants.

"As if the lessee covenants for himself and his assigns to build a house upon the land of the lessor, which is no parcel

of the demise, or to pay any collateral sum to the lessor or to a stranger, it should not bind the assignee, because it is merely collateral and in no manner touches or concerns the thing that was demised, or that is assigned over; and therefore in such case the assignee of the thing demised cannot be charged with it no more than any other stranger." (Spencer's case, 5th Coke's Rep. 16.)

It is clear that the agreement of the Des Moines Northwestern Company to deliver its freight and passengers to the Fort Dodge Company was only a personal engagement, and therefore, no matter what the intention of the parties may have been, if the thing to be done was collateral to the land and of such a character that the law did not permit it to be attached to an estate, then it could not be attached by any agreement of the parties.

The case of Kepple *v.* Bailey (2d Mylne & K, 517), was decided upon the following facts. Certain persons had formed themselves into a company for the establishment of a railroad called the Trevil, and Edward and Jonathan Kepple, who held the Beaufort Iron Works under a long lease, covenanted with the proprietors of the railroad and their assigns, that they (the Kepple's), their executors, administrators and assigns would purchase all the limestone wanted for the Iron Works from the Trevil quarry and carry it along the Trevil Railroad, paying a certain toll. Edward and Jonathan Kepple afterwards assigned their lease of the Iron Works to the defendant, who began to construct a new railroad to other quarries, and on a bill for an injunction to restrain them from using the new railroad, it was among other points objected, that the covenant did not run with the land so as to bind the defendants as assigns of the Iron Works.

On that point Lord Chancellor Brougham said: —

" Assuming that the Kepples covenanted for their assigns of the Beaufort works, could they by a covenant with persons who had no relation whatever to those works, except that of having a lime quarry and a railway in the neighborhood, bind all persons who should become owners of those works, either by purchase or descent, at all times to buy their lime at the quarry, and carry their iron on the railway; or could they do more, if the covenant should not be kept, than give the covenantees a right of action against themselves, and recourse against their heirs and executors, as far as those received assets? Consider the question first upon principle. There are certain known incidents to property and its enjoyment, among others, certain burdens wherewith it may be affected, or rights which may be created, or enjoyed with it, by parties other than the owner, all which incidents are recognized by the law. But it must not therefore be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. It is clearly inconvenient both to the science of the law and to the public weal, that such a latitude should be given. There can be no harm in allowing men the fullest latitude in binding themselves and their representatives, that is, their assets, real and personal, to answer in damages for breach of their obligations. This tends to no detriment, and is a reasonable liberty to bestow; but great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote. Every close, every messuage, might thus be held in a different fashion, and it would be hardly possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed. The right of way or of common is of public, as well as of a simple nature, and no one who sees the premises can be ignorant of what all the vicinage knows. But if one may bind his messuage and land to take lime from a particular kiln, another may bind his to take coals from a certain pit, while a third may load

his with obligations to employ one blacksmith's forge or the members of one corporate body, in various operations on the premises, besides many other restraints, as infinite in variety as the imagination can conceive; for there can be no reason whatever in support of the covenant in question which would not extend to every covenant that can be devised."

The case of *Newburg Petroleum Company* v. *Weare* (44 Ohio State, 604) was decided upon the following facts: In August, 1866, John H. Weare was the owner of certain oil producing lands in Ohio, subject to certain leases which his grantors had executed, and under which the Newburg Petroleum Company was then in possession and obtaining oil. The Newburg Petroleum Company thereupon entered into a written contract with Weare by which the company agreed to release and convey to Weare all its interest under the leases, and as a part of the consideration for such release Weare agreed "to pay and deliver to the company, their successors and assigns, upon the premises so released, the one full equal sixth part of all the coal, carbon, or rock, oil, salt, or other mineral substance excavated, produced or pumped therefrom daily, as produced during the rest and residue then remaining of the term granted in the above mentioned leases."

Thereupon the company in fulfillment of its agreement, conveyed all its interest in the premises to Weare and put him in possession. This conveyance was duly recorded on September 3d, and on the same day Weare conveyed a portion of the premises to the Exchange Oil Company of Cincinnati, and that company was put in possession, and although large quantities of oil were taken from the premises, said Exchange Oil Company of Cincinnati refused to deliver any portion thereof to the Newburg Petroleum

Company, as required by the contract under which the latter had released to Weare.

Action was brought and it was charged that the Exchange Oil Company of Cincinnati, at the time of its purchase, had full knowledge and actual notice of the contract with Weare and of plaintiff's right to one-sixth of the oil produced on said premises. It was also charged that said Exchange Oil Company of Cincinnati agreed to and with said Weare to satisfy the plaintiff's rights and claims under said agreements, and that it took the bond and obligation of said Weare to repay to it any sum that it might have to pay to the plaintiff. The question was as to whether, on that state of facts, the covenants of Weare to deliver to plaintiff one-sixth of the oil produced on the premises run with the land and were obligatory upon the Exchange Oil Company of Cincinnati.

In determining the question the Court said:—

"By the terms of this agreement as set forth Weare binds himself alone. And he does not grant to plaintiff any interest in the land itself; and he does not agree to produce any oil or mineral substance from the land; but if, during the terms of those leases, any oil or mineral substance is 'produced or pumped thereon or therefrom'—which will thus be separated from the realty and become personality—Weare agrees to pay and deliver upon said leased premises, to the Newburg Petroleum Company, its successors and assigns, the one full equal sixth part of such oil or mineral substance, daily, as produced.

The plaintiff as assignee of these leases, owned no part of these lands, and it had only a right, for a term of years, to produce or pump oil and other mineral substances on and from these lands. Subject to this right for such term of years, Weare owned these lands and all that was appurtenant thereto, and when the plaintiff released and conveyed to Weare, without reservation, this right and all

plaintiff's interest in the lands and put him into possession of the same; and when it took Weare's agreement to pay and deliver to plaintiff the one-sixth part of what should be produced or pumped thereon or therefrom; there was no 'thing *in esse*, parcel of the demise,' that was 'annexed and appurtenant to the thing demised,' so as to bring this case within the first part of that (the first) rule in Spencer's case; and it seems to fall within the second part of that (the first) rule, and that the covenant binds 'the covenantor, his executors or administrators, and not the assignee.'

Weare did not attempt to bind his assigns in express terms, and he did not make the payment of the one-sixth part of the production a charge on the land; neither did the law make such payment or delivery a lien upon the land, as it does in case of a tax on land."

The case of *Norcross* v. *James* (140 Mass. 188) presents a good illustration of the same principle. In that case one Kibbe, being the owner of a farm in Long Meadow, conveyed a valuable quarry of six acres to one Flynt, the tract conveyed being bounded by the other lands of Kibbe. In his deed to Flynt, Kibbe, for himself, his heirs and executors, covenanted with Flynt and his heirs and assigns as follows: —

"And I do for myself, my heirs, executors and administrators, covenant with said Flynt, his heirs and assigns, that I am lawfully seized in fee of the afore-granted premises; that they are free of all incumbrances, and that *I will not open or work or allow any person or persons to open or work* any quarry or quarries on my farm or premises in said Long Meadow."

Through mesne conveyances Norcross become the owner of the quarry and James become the owner of the surrounding lands referred to in the deed, and James the de-

fendant, was, in violation of the covenant, quarrying stone from the lands surrounding that conveyed to Flynt, and the plaintiff, Norcross, as grantee of Flynt, sought an injunction. The Court held that the plaintiff was not entitled to any relief, and its decision is put expressly on the ground, that the covenant did not run with the land, or touch or concern, "or extend to the support of the thing conveyed."

The application of the foregoing principle to the facts in this case is simple, for if the covenants of the Des Moines Northwestern Company to deliver all its freight to the Fort Dodge Company did not run with the property, then that covenant was not binding on the Wabash Company as a lessee. And if the Wabash Company was not required by the contract to deliver its freight to the Fort Dodge Company, then of course no action for damages can be maintained against it on that account, because in carrying its own freight over the new line from Waukee to Des Moines it committed no legal wrong.

IV.

The intervening petition was properly dismissed, because the clause in the agreement to the effect, that said contract and any damages for a breach thereof, should be a continuing lien upon the roads of the contracting parties, was ineffectual and wholly failed to pass an estate or create a lien on their railroads.

In view of the authorities quoted in the preceding paragraph, it will hardly be contended that an ordinary agreement on the part of one railroad company to deliver to another its freight and passengers, would be anything more than a mere personal covenant. But in this case the contention is, that a lien was created on the railroad of the Des

Moines Northwestern Company by the last clause of the agreement, which declared that "said contract and any damages for a breach of the same shall be a continuing lien upon the roads of the two contracting parties in whosesoever hands they may come."

In order to determine whether that clause of the agreement created a lien on any part of the road of the Des Moines Northwestern Company, which affected it in the hands of the Wabash Company, as lessee, we must first ascertain whether the clause in question contains such words of grant as are necessary in order to create an estate in, or a lien upon lands. Liens and charges on lands can only be created by deed executed in the manner provided by law, and in order to make an instrument effective, as a deed for the transmission of title, it must contain some proper words of grant which are recognized in the law as sufficient to pass an estate.

To illustrate: If A. and B. were to have an accounting, at the end of which A. should be found indebted to B. in the sum of one hundred dollars, and thereupon A. should give B. a promissory note containing a clause to the effect that the note should constitute a lien on his real estate: Could it be truthtully said that a mere declaration of that sort, unaccompanied by any words of grant, would be sufficient to create a lien on the lands of A. which would bind them in the hands of a subsequent purchaser? We think not, because it is clear that such an instrument would be wholly lacking in all that is requisite to create an interest in, or a lien upon lands.

Indemnity mortgages and mortgages to secure advances are often made and contracts to make mortgages are not unusual, and when such mortgages or agreements are made, they are enforced against all parties and

purchasers with notice. But there is nothing of that sort in this case. Here we have neither a mortgage nor a contract to make a mortgage, and the sole question is as to whether the declaration that "the contract shall be a lien," made it one. This is not a suit to reform an instrument or correct a mistake, for it is not contended that any mistake was made. It is not claimed that the instrument is in any respect different from what it was intended to be, and as it is not in itself sufficient to create a lien, the court should not give it that effect.

V.

The clause in the lease of the Des Moines Northwestern Company to the Wabash Company, which states that the Wabash Company took the lease subject to the contract of the Des Moines Northwestern Company with the Fort Dodge Company, and was to perform the same or save the Des Moines Northwestern Co. harmless therefrom, was only an indemnity contract to which the plaintiff was not a party and for a breach of which it cannot sue.

The ninth clause of the lease made February 28, 1881, by the Des Moines Northwestern Company to the Wabash Company (page 23 of Record), states that the lease is made subject to the contract of November 18, 1879, with the Des Moines & Fort Dodge Company, and that the Wabash Company would either perform the same or save the Des Moines Northwestern Company harmless from damages on account thereof.

No one will seriously contend that the foregoing clause in the lease of the Des Moines Northwestern Company to the Wabash Company did or could in any manner affect the rights of intervenor under its contract of November 18, 1879, with the Des Moines Northwestern Company. The provision in the Wabash lease

to the effect, that the Wabash Company "would perform the agreement with the Fort Dodge Company, or save the Des Moines Northwestern Company harmless on account thereof," was only a personal covenant. It ranked no higher than any other personal promise of the Wabash Company. It was not an undertaking which could give a party injured by its non-performance a superior lien on any fund. An unsecured promise of the Wabash to perform the contract or save the Des Moines Northwestern Company harmless on account thereof, ranked no higher than its unsecured promise made on the same day to pay a given sum of money. It is therefore clear that nothing contained in the lease from the Des Moines Northwestern Company to the Wabash altered or improved the situation of intervenor in any respect. If intervenor had no lien through its own contract with the Des Moines Northwestern Company, it obtained none through the contract of the Des Moines Northwestern Company with the Wabash.

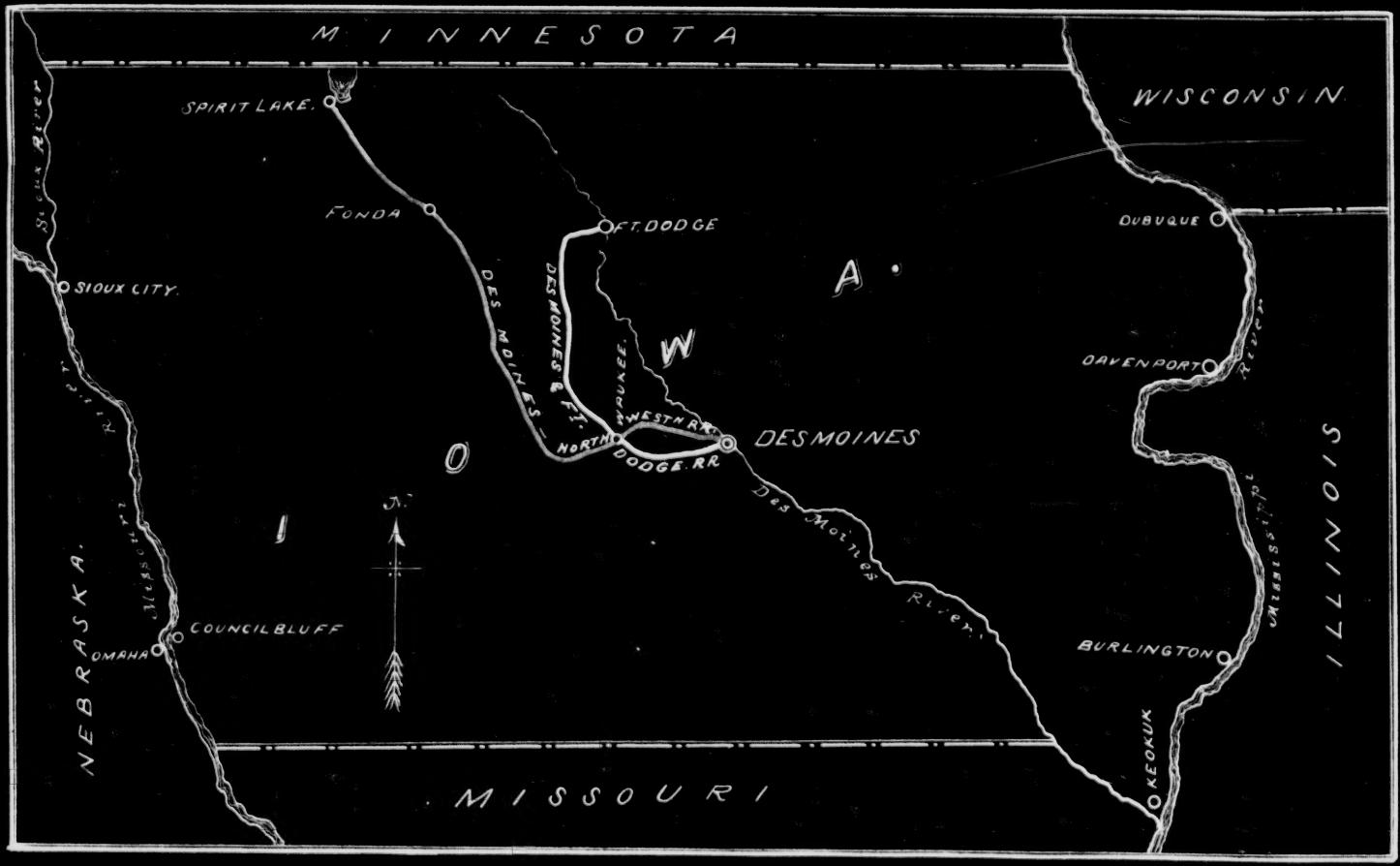
VI.

Unless the last clause of the contract of November 18, 1879, between intervenor and the Des Moines Northwestern Company was sufficient to give intervenor a lien on the Des Moines Northwestern Railroad, then the petition was properly dismissed, because it is only those who have specific liens on the property or funds in court who can intervene in foreclosure suits.

Although intervenor may have a legal claim for damages against the Des Moines Northwestern Company for a breach of its contract, or though it might have an action against the Wabash Company upon its personal undertaking to perform that agreement, yet that fact would not give in-

tervenor any standing in this court, for it is only when a party has a lien upon, or an interest in the subject-matter or thing in dispute, or the property or funds in court, that he can have relief by intervention in a court of equity. A mere statement of that rule is sufficient.

WELLS H. BLODGETT,
Solicitor for Humphrey & Tutt, Receivers.


MINNESOTA
WISCONSIN
SPIRIT LAKE.
St. Clair River
FONDA
FT. DODGE
DUBUQUE
SIOUX CITY.
DES MOINES
DES MOINES & FT.
MILWAUKEE
DAVENPORT
I O W A
NORTH WEST'N R'Y
DES MOINES
DODGE. R.R.
Des Moines River
Mississippi River
ILLINOIS
Missouri River
NEBRASKA.
COUNCIL BLUFF
OMAHA
BURLINGTON
KEOKUK
MISSOURI